Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES *ex rel.* STANLEY RABUSHKA
and STANLEY RABUSHKA,

Petitioners,

v.

CRANE CO.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Is reliance an element of a False Claims Act case based upon a fraudulent failure to disclose material information to the Government?

II.

If reliance is an element of a False Claims Act case based upon a fraudulent omission, is proof that government employees should have acted to prevent any loss to the Government, if they had known the fraudulently concealed information, sufficient to support a finding of reliance?

LIST OF PARTIES

The caption of this petition identifies all parties in the lower court. Petitioner Stanley Rabushka, the *qui tam* relator bringing this case on behalf of the United States, is an individual.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported as *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559 (8th Cir. 1997). It is reprinted in the Appendix ("App.") at A-1. The court of appeals' order denying Rabushka's petition for rehearing is not reported and is reprinted at App. A-16. The district court's unpublished opinion and order are reprinted at App. A-17.

JURISDICTION

The court of appeals entered its judgment on August 11, 1997. It denied a timely petition for rehearing on September 16, 1997. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is 31 U.S.C. § 3729(a). It is reprinted at App. A-90.

STATEMENT OF THE CASE

The district court had federal question jurisdiction over this case. 28 U.S.C. § 1331.

This is a *qui tam* False Claims Act[1] (FCA) case involving a loss of more than $222 million to the Government. The FCA imposes liability on any person who knowingly causes a false or fraudulent claim to be presented to the Government for payment; knowingly makes, uses or causes to be made or used a false record or statement to get a false or fraudulent claim paid by the Government; or conspires to defraud the Government by getting a false or fraudulent claim allowed or paid. 31 U.S.C. § 3729(a). At issue is whether reliance must be proven to establish causa-

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[1] 31 U.S.C. §§ 3729-3733.

tion in FCA cases based upon fraudulent omissions. The FCA imposes liability for "3 times the amount of damages which the Government sustains *because of* the act of" a person submitting a false claim to the Government for payment. 31 U.S.C. § 3729(a) (emphasis added). The first question presented is whether reliance is even an element of an FCA claim based upon a fraudulent failure to disclose material information to the Government. If so, the second question is whether proof that government employees should have acted to prevent a loss to the Government, if they had known the facts fraudulently concealed, is sufficient to support a finding of reliance.

In May 1985, Crane Co. gave away its subsidiary, CF&I Steel Corporation, by dividending to Crane's shareholders its 96.3% of all outstanding CF&I shares. A little more than five years later, in November 1990, CF&I filed for bankruptcy. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2109, 135 L.Ed.2d 506 (1996). During CF&I's bankruptcy proceedings, the Pension Benefit Guaranty Corporation (PBGC) chose to terminate CF&I's pension plan and assume liability for over $222 million worth of ERISA-guaranteed pension benefits.

Just 15 months prior to Crane's 1985 spin-off of CF&I, Crane and its top officers and directors *knew* CF&I was, in the words of Crane's own CEO, a "bankrupt company." Because CF&I had no hope of surviving the spin-off, Crane's president regarded spinning off CF&I as being contrary to everything "[m]oral, ethical, sound business practice, common sense, and the American way." In fact, from 1982 through 1984, CF&I had sustained total losses exceeding $145 million.

When CF&I first began to sustain those disastrous financial losses in 1982, Crane responded by discontinuing its corporate policy of requiring CF&I to fully fund its pension plan. Crane slashed CF&I's contributions from over $38 million in 1980 and

over $22 million in 1981 to $4.6 million in 1982 and then to zero in 1983, 1984, 1985 and 1986.[2]

In an effort to avoid sustaining serious financial damage itself as a result of CF&I's unfunded pension obligations, Crane attempted to sell CF&I during 1983 and 1984. Crane would only consider selling CF&I to a buyer having sufficient assets to cover CF&I's unfunded pension obligations, because Crane feared that otherwise those obligations could come back to "bite" Crane. Price would have been no object, if Crane could have found a buyer with sufficient net worth willing to take on CF&I's pension liabilities. Crane never found such a buyer for CF&I. In the year of the spin-off, 1985, CF&I's financial condition continued to plummet, with its net sales dropping $20.6 million in the first quarter alone. By year-end its sales were down $72 million. In May of that year, Crane spun off CF&I.

Because CF&I could not survive without its parent, the spin-off was, in reality, a transaction which would (and did) implement the complete liquidation of CF&I. PBGC regulations required Crane to report CF&I's "involve[ment] in any transaction to implement its complete liquidation[.]" 29 C.F.R. § 2615.22(a). Crane, however, failed to report that CF&I could not survive the spin-off or that the spin-off of CF&I was a liquidation of CF&I.

Crane's liability in this case rests upon the proposition that if the PBGC had known in 1985 what Crane knew and was obligated by law to report–namely that CF&I was an inviable, "bankrupt" company that could not survive the spin-off and that

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[2] During those four years, CF&I was able to rely on the credit it had built up from its maximum funding of the plan prior to 1982. CF&I's credit ran out in 1987, and CF&I was obliged to resume contributions to amortize past service liabilities in 1988. CF&I was forced to file bankruptcy proceedings when it was unable to make its 1989 payment. *Reorganized CF&I*, 116 S. Ct. at 2109.

Crane's spin-off of CF&I therefore constituted a liquidation of CF&I–the PBGC either should have or would have terminated CF&I's pension plan at the time of the 1985 spin-off and held Crane liable for CF&I's pension plan's massive, unfunded pension obligations. As the court of appeals noted,

> Crane does not dispute that had the PBGC terminated CF&I's plan at the time of [Crane's 1985] spin-off [of CF&I], Crane could have been held liable for CF&I's unfunded pension liabilities.

App. at A-4.

The PBGC's reasons for terminating the plan in 1992, seven years after the spin-off, were primarily based on the pre-1985, pre-spin-off financial crises at CF&I. Citing CF&I's massive 1982 reduction in workforce, the PBGC concluded that its

> long-run loss may reasonably be expected to increase unreasonably unless the plan is terminated because termination is inevitable and failure to act quickly will likely result in additional benefits becoming guaranteed which will cause PBGC's net loss to increase.

Accordingly, the PBGC terminated the CF&I pension plan in March 1992, and assumed full responsibility and liability for more than $222 million of unfunded, ERISA-guaranteed pension obligations.

Because the PBGC lacked authority to block the spin-off, its *only* option to shield itself against responsibility for CF&I's enormous unfunded pension obligations would have been to terminate the plan at the time of the spin-off and hold Crane liable. Had the PBGC known in 1985 that CF&I could not survive the spin-off, a PBGC refusal to terminate the plan would have been irrational because it would only have postponed the inevitable termination to a time when there would be no parent corporation like Crane to pick up the tab, thus leaving the PBGC to pay the pensions.

Royal Dellinger, a former deputy executive of the PBGC, testified in his deposition that had he known that the spin-off constituted a liquidation of CF&I, the PBGC "clearly would have reviewed the case differently," and "the agency would have initiated an effort to find out if in fact a liquidation was going to occur." App. at A-11. Incredibly, however, Dellinger later speculated that he, on behalf of the PBGC, would not have approved a termination of the plan, even if he had known that Crane's spin-off of CF&I would implement the complete liquidation of CF&I. In other words, Dellinger would have caused the PBGC to take on certain massive debt in the future, rather than holding Crane liable at the time of the 1985 spin-off.

Indeed, in an affidavit he gave in violation of PBGC regulations[3], after his deposition and after the close of discovery, Dellinger went so far as to claim that he

> would not have terminated the plan in 1985 or thereafter, because it would have been inconsistent with our policy and practice to do so, *regardless of any "fraudulent concealment of the facts."*

Dellinger also declared in his affidavit that even had he known that the PBGC could have avoided any loss by terminating the plan in 1985, he *still* would not have approved or recommended a termination of CF&I's plan.

The district court granted summary judgment on three counts.[4] As the court of appeals summarized,

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[3] In a letter which was sent to counsel and to the district court, the General Counsel for the PBGC explained at length that Dellinger's affidavit violated PBGC regulations and that the "PBGC did not authorize the Dellinger affidavit[.]" That letter is reproduced in the Appendix at A-87.

[4] The district court granted judgment on the pleadings on another count, and the Eighth Circuit affirmed. App. at A-12. Petitioner is not seeking review of those rulings.

> [t]he [district] court concluded that Crane did not prepare or submit any documents to the PBGC about CF&I's plan; that Crane had no duty under ERISA to report any information to the PBGC or to pay for CF&I's unfunded pension liabilities; that Crane could not be held liable under "predecessor liability" or "sham transaction" theories advanced by Rabushka; and that there was no basis for piercing CF&I's corporate veil and holding Crane liable as an alter ego corporation.

App. at A-5.

The Eighth Circuit affirmed the grant of summary judgment but "for a reason different from those relied upon by the district court." App. at A-7. First, the court of appeals held that the Government (or the *qui tam* relator suing on its behalf) must prove what the Government in fact would have done but for the fraudulent concealment. The court wrote:

> If Rabushka cannot show that the PBGC would have terminated CF&I's pension plan in 1985 had it known that the spin-off was a transaction to implement CF&I's liquidation, then there is no false claim because the PBGC's payment of CF&I's unfunded pension liabilities would have occurred regardless of Crane's actions.[5]

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[5] Although the Eighth Circuit technically held that Rabushka had presented insufficient proof of the existence of a false claim, App. at A-8, A-12, the real basis for the Court's decision was its conclusion that Rabushka had failed to prove that the Government detrimentally relied upon the false claims which Rabushka alleged. Rabushka alleged that Crane caused former CF&I employees to file false pension claims upon the Government; those claims were false because the claimants sought to compel the PBGC to use its own funds to pay for pension obligations which should have been paid with Crane assets. The Eighth Circuit did not reject the argument that the PBGC *should have* terminated CF&I's pension plan at the time of the 1985 spin-off and held Crane accountable for CF&I's unfunded pension debt. Rather, the Eighth

(Footnote 5 continued on next page)

App. at A-8. Second, the court held that proof of what the Government should have done, what its employees were duty-bound to do, and what the Government in fact did (once it learned the facts Crane fraudulently concealed) is insufficient to establish the element of reliance.

The court also erroneously and inexplicably stated that at oral argument Petitioner

> conceded that he would have to prove at trial that the PBGC would have terminated the plan in 1985 had it known the information Crane allegedly wrongfully withheld.

App. at A-8. In fact, at three different points during oral argument, Petitioner maintained that in False Claims Act cases like this, liability must depend upon what the Government *should* have done if it had known the facts fraudulently concealed.[6] Moreover, in a Rule 28(j) letter submitted after oral argument, Petitioner specifically addressed the issue again:

(Footnote 5 continued)

Circuit affirmed the entry of summary judgment against Rabushka solely on the grounds that Rabushka had failed to establish that the PBGC "*would have* terminated CF&I's plan in 1985," even if the PBGC had known the fraudulently concealed fact that Crane's spin-off of CF&I was a transaction to implement CF&I's complete liquidation. App. at A-12. Thus, the real issue presented by this case is what, if anything, the Government must do in order to establish reliance in a False Claims Act case based upon fraudulent omissions.

[6] App. at A-79 ("what the law ought to be is what the government agency should have done under the law if it's presented with the case", App. at A-79; "when it comes to federal agencies, and we're talking about the public fisc, that there ought to be a slightly different standard. What should the government, in fact, [have] done if it discharged its responsibilities under the law?", App. at A-82; " It's our position that if the government should have terminated the plan that ought to be good enough", App. at A-82). Likewise, Petitioner did not concede "that he had no evidence that the PBGC would have

(Footnote 6 continued on next page)

> During oral argument, the issue was raised whether at trial Relator would have to prove what the Government *would* have done but for Crane's fraudulent concealment or whether proof of what the Government *should* have done would be sufficient.

App. at A-84. Citing supplemental authority, Petitioner reiterated his position that proof of what the Government *should* have done is sufficient. Thus, contrary to the Eighth Circuit's opinion, Petitioner clearly did *not* concede "that he would have to prove at trial that the PBGC would have terminated the plan in 1985[.]"

(Footnote 6 continued)

terminated the plan in 1985." App. at A-8. Rather, petitioner acknowledged only that he had no *direct* evidence, and cited the court to the circumstantial evidence discussed in Point II below. *See* App. at A-81 ("we don't have an opinion of somebody who says, yes, in 1985 that [the] PBGC would have terminated the plan, but we do have other evidence, that's what I've been talking about, in terms of what Mr. Dellinger said in his deposition and what the PBGC actually did").

ARGUMENT

The Eighth Circuit's first premise, that reliance is an element of a False Claims Act case based upon a fraudulent omission, is irreconcilable with this Court's holding in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 1456, 31 L.Ed.2d 741 (1972), where the Court held that in SEC Rule 10b-5 cases based upon fraudulent omissions, reliance is not an element of the cause of action. The rationale for that rule is not peculiar to Rule 10b-5 or the securities laws in general. It is simply that proving "reliance" on an omission is difficult, if not impossible. That rationale applies with full force whether the claim of fraudulent omission is made by a private investor under the securities laws or by the Government under the False Claims Act.

The Eighth Circuit's second premise, that proof of what the Government should have done, what its employees were duty-bound to do, and what the Government in fact did (once it learned the facts Crane fraudulently concealed) is insufficient to establish the element of reliance, conflicts with well- and long-settled law, not just from other federal courts of appeals, but from other federal and state courts. First, the holding simply disregards the law recognized in every jurisdiction that reliance may be proved by circumstantial evidence. Second, the court implicitly repudiated the age-old "principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers." *United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 314, 38 S. Ct. 525, 62 L.Ed. 1130 (1918).

I. Reliance is not an element of a False Claims Act cause of action involving primarily a failure to disclose material information.

It has long been recognized that the Government's remedies under the False Claims Act are independent of and in addition to those available in a cause of action for common law fraud. *United States v. Mead*, 426 F.2d 118, 124 (9th Cir. 1970); *United States v. Borin*, 209 F.2d 145, 148 (5th Cir. 1954); *United States v. Silliman*, 167 F.2d 607, 611 (3d Cir. 1948); *Pooler v. United States*, 127 F. 519, 520-21 (1st Cir. 1904). The elements of a False Claims Act cause of action are set out in the statute. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Although one federal court has held that reliance is not an element of an FCA cause of action, *United States v. Bd. of Educ. of City of Union City*, 697 F. Supp. 167, 179 (D.N.J. 1988), Petitioner will assume for the sake of argument that reliance is an element of FCA claims for damages[7] based upon fraudulent, affirmative misrepresentations. *See, e.g., United States v. First Nat'l Bank of Cicero*, 957 F.2d 1362, 1374 (7th Cir. 1992) (government's reliance on false statement was "sufficient to establish the causal relationship between the false claim and the government's damages"). In False Claims Act cases based upon fraudulent omissions, however, "reliance" should not be an element of the cause of action.

In another well-established body of federal law, this Court held that reliance is not an element of an action based upon a fraudulent omission of material fact. In *Affiliated Ute Citizens*

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[7] "The absence of such proof does not preclude the assessment of penalties, attorney's fees, and costs. *See Rex Trailer Co., Inc. v. U.S.*, 350 U.S. 148, 153 n.5, 76 S. Ct. 219, 222 n.5, 100 L.Ed. 149 (1956)); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)." App. at A-49, n.9.

of Utah v. United States, 406 U.S. 128, 92 S. Ct. 1456, 31 L.Ed.2d 741 (1972), this Court held that in SEC Rule 10b-5 cases

> involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. *This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.*

Id. at 153-54 (emphasis added; citations omitted). The Court reaffirmed this rule in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 447 n.9, 96 S. Ct. 2126, 48 L.Ed.2d 757 (1976), noting that "positive proof of reliance is unnecessary when materiality is established." *Id.*

As the Eighth Circuit itself has explained the holding of *Affiliated Ute*, "'reliance has little rational role' in cases of nondisclosure, largely because of the difficulty of proving reliance on the negative." *Vervaecke v. Chiles, Heider & Co., Inc.*, 578 F.2d 713, 717 (8th Cir. 1978) (quoting Bromberg, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV.L.REV. 584, 590 (1975)). *See also* 3 DEVITT, BLACKMAR & WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.02 notes (1987) ("reliance is not necessarily always an element of a Rule 10b-5 claim. When the claim is based upon omissions, then a showing of reliance could hardly be possible and is not required.").

This rationale for dispensing with the reliance element in cases of fraudulent omissions under Rule 10b-5 is equally compelling in fraud-by-omission cases under the False Claims Act. The nondisclosure of facts that a reasonable government agency or government employee might have considered important ought to "establish the requisite element of causation in fact," just as the withholding of facts that a reasonable investor

might have considered important would establish causation in a Rule 10b-5 case. *Affiliated Ute*, 406 U.S. at 154. *See United States ex rel. Berge v. Trustees of Univ. of Alabama*, 104 F.3d 1453, 1460 (4th Cir. 1997) ("the materiality of the false statement turns on 'whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action'").

Petitioner's evidence certainly met that burden. Dellinger himself testified that had he known that Crane's spin-off of CF&I constituted a liquidation of CF&I, the PBGC "clearly would have reviewed the case differently," and "the agency would have initiated an effort to find out if in fact a liquidation was going to occur." App. at A-11. In addition, the very fact that PBGC regulations require the reporting of transactions which will implement the liquidation of a contributing sponsor is itself proof of the materiality of such information.

Crane failed to disclose a highly material fact, which PBGC regulations required Crane to report, when it knowingly failed to report that its spin-off of CF&I would implement CF&I's complete liquidation. Proof of those facts should be sufficient to establish the causation element of Crane's False Claims Act liability. Accordingly, this Court should review the Eighth Circuit's ruling to clarify whether reliance is an element of a False Claims Act case based on a fraudulent omission.

II. If reliance is an element of a False Claims Act case involving primarily a failure to disclose, then proof that government employees should have acted to prevent a loss to the Government, if they had known the facts fraudulently concealed, is sufficient to support a finding of reliance.

Courts have long recognized that in common law fraud actions, the element of reliance need not be proven by direct testimony of reliance. Even in cases involving affirmative

misrepresentations, reliance may be inferred (or even presumed in the absence of contrary evidence) from the circumstances surrounding the transaction.[8] Indeed, as the court recognized in *Hunter v. McKenzie*, 197 Cal. 176, 185, 239 P. 1090, 1094 (Cal. 1925), "circumstances surrounding the transaction oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." 239 P. at 1094. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 167 comment b (1981) ("Circumstantial evidence is often important in determining whether a misrepresentation has been an inducing cause.").

In a False Claims Act case, proof of what the Government *should* have done had it known the concealed facts is one such circumstance that ought to be sufficient to support an inference of what the Government *would* have done. ERISA mandates the PBGC "to maintain premiums . . . at the lowest level consistent with carrying on its obligations . . . ." 29 U.S.C. § 1302(a)(3). Moreover, ERISA specifically authorizes the PBGC to institute proceedings to terminate a plan whenever "the possible long-run loss of the [PBGC] with respect to the plan may be expected to increase unreasonably if the plan is not terminated." 29 U.S.C. § 1342(a)(4). Congress certainly did not grant the PBGC the

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[8] *See, e.g., State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 422 n.26 (Alaska 1982) (quoting 12 WILLISTON ON CONTRACTS § 1515, at 480 (3d ed. 1970)); *Hunter v. McKenzie*, 197 Cal. 176, 185, 239 P. 1090, 1094 (Cal. 1925); *Frontier Exploration, Inc. v. Am. Nat'l Fire Ins. Co.*, 849 P.2d 887, 891 (Colo. Ct. App. 1992); *Sriver v. Maley*, 128 Ind. App. 619, 625-26, 151 N.E.2d 518, 521 (Ct. App. 1958); *Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 292 (Iowa 1975); *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 78, 626 P.2d 822, 827 (Mont. 1981); *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 196, 660 N.E.2d 770, 779 (Ohio Com. Pl. 1995) (citing *AMF Inc. v. Computer Automation., Inc.*, 573 F. Supp. 924, 933 (S.D. Ohio 1983)); *East Providence Loan Co. v. Ernest*, 103 R.I. 259, 263, 236 A.2d 639, 642 (1968).

authority to turn a blind eye where the long-run loss to the PBGC was certain to increase unreasonably (by hundreds of millions of dollars) if a plan was not terminated. Indeed, for the PBGC to have done so would have been an abdication of the very role that Congress intended it to fulfill. The PBGC cannot take on huge, avoidable debts and, at the same time, maintain premiums at the lowest possible level consistent with its obligations. Taking on such avoidable debt is not just irrational; it runs directly counter to the PBGC's very mission mandated by Congress.

Moreover, when the PBGC finally did terminate CF&I's pension plan in 1992, it did so after learning the very facts which Crane concealed at the time of the 1985 spin-off. In an internal memorandum recommending involuntary termination of CF&I's pension plan in 1991, the PBGC explained:

> Through a combination of poor markets and poor planning, CF&I is no longer economically viable in its present form. *As part of the 1982* and other restructurings, CF&I's workforce has shrunk from about 8000 employees to under 2000, *leaving a retiree burden beyond CF&I's ability to handle.* Further, CF&I's lack of capital expenditures over the past 8 years [*i.e.*, since 1983] has left CF&I's plant virtually obsolete. *It appears that CF&I would have been headed for bankruptcy regardless of its retiree claims.*

As already noted, even Dellinger himself grudgingly conceded that had he known that Crane's spin-off of CF&I constituted a liquidation of CF&I, the PBGC "clearly would have reviewed the case differently," and "the agency would have initiated an effort to find out if in fact a liquidation was going to occur." App. at A-11.

Failing to recognize that the element of reliance may be established by such circumstantial evidence, the Eighth Circuit usurped what should have been the fact-finder's prerogative to

infer reliance on the basis of circumstantial evidence. The court was accordingly unable to fulfill its obligation to

> view all facts in the light most favorable to [Petitioner] and give to [Petitioner] the benefit of all reasonable inferences that can be drawn from the facts.

Donaho v. FMC Corp., 74 F.3d 894, 897-98 (8th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)). The Eighth Circuit compounded this error by improperly relying on "Crane's evidence," consisting primarily of Dellinger's speculative testimony,[9] and concluding that Crane's evidence "overwhelmingly establishes that the PBGC would not have terminated CF&I's plan in 1985." App. at A-11. The court's reliance on Dellinger's testimony necessarily entailed the very kind of "credibility assessment" which is "not fit grist for the summary judgment mill." *Dibidale of Louisiana v. Am. Bank & Trust Co.*, 916 F.2d 300, 307-308 (5th Cir. 1990).

In any event, what Dellinger would or would not have done is entirely beside the point if his actions would have been outside the scope of his legal authority. It has long been

> [t]he general principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers . . . .

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[9] The Eighth Circuit also relied in part upon the fact that in 1987 the PBGC refused to terminate CF&I's pension plan, despite CF&I's request that year for termination based upon the company's financial condition. However, unlike in 1985, when "Crane could have been held liable for CF&I's unfunded pension liabilities," App. at A-4, a PBGC termination in 1987 would have required the PBGC to assume liability for CF&I's pension obligations without a corporate parent like Crane to hold liable. Thus, in 1987, it was not unreasonable for the PBGC to refuse termination in the hope that CF&I might recover and be able to bear responsibility for its own pension obligations.

United States v. St. Paul, M. & M. Ry. Co., 247 U.S. 310, 314, 38 S. Ct. 525, 62 L.Ed. 1130 (1918). The Eighth Circuit, too, has recognized as "well settled" the principle "that the United States is not bound by the unauthorized acts or representations of its agents." *DeVilbiss v. SBA*, 661 F.2d 716, 718 (8th Cir. 1981).[10] The rationale for this rule of law, as explained in another False Claims Act case, is that "the public in general should not so suffer for the act of a single government agent . . . ." *United States v. Fox Lake State Bank*, 225 F. Supp. 723, 724 (N.D. Ill. 1963).

This fundamental principle was the basis for decision in the False Claims Act case of *United States v. Kates*, 419 F. Supp. 846 (E.D. Penn. 1976). In that case the defendants contended "that the conduct of [the Government's agents] contributed to the loss and precludes recovery thereof." *Id.* at 854. The *Kates* court flatly rejected that argument:

> First, the False Claims Act provides a remedy for conduct in the nature of common law fraud, which is an intentional tort, and contributory negligence would be no defense.

Id. (citations omitted). Although the defendants "offered nothing" to show that the individuals in question were agents of the government, the court held "even if they were, *the government would not be precluded from recovery by their unauthorized conduct*." *Id.* (emphasis added).[11]

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[10] *Accord United States v. U.S. Cartridge Co.*, 78 F. Supp. 81, 85 (E.D. Mo. 1948) ("Citation of authority is not necessary to support the proposition that the Government is not bound by acts of its officers which are not within the scope of the conferred authorities."); *United States v. One Distillery and Fixtures*, 193 F. 720, 724 (D.N.C. 1911) ("The government does not lose its rights by reason of the failure of its officers to discharge their duty, or because of their dereliction or malfeasance . . . .").

[11] *Accord United States v. Cripps*, 460 F. Supp. 969, 974 (E.D. Mich. 1978) ("To the extent that defendant is urging that someone at HUD authorized him to engage in this conduct to defraud HUD and submit false claims . . . . such

(Footnote 11 continued on next page)

Similarly, the majority of federal courts which have addressed the issue have held that even the Government's *actual* knowledge of the falsity of a statement or claim does not protect the person submitting the false statement or claim from False Claims Act liability. *See, e.g., United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1421 (9th Cir. 1991) ("That the relevant government officials know of the falsity is not in itself a defense."); *United States ex rel. Kreindler & Kreindler v. United Technologies,* 985 F.2d 1148, 1156 (2d Cir. 1993) (citing and agreeing with *Hagood*); *United States v. Ehrlich,* 643 F.2d 634, 639 (9th Cir. 1981) (HUD's knowledge of overstated costs did not "br[eak] the chain of causation").

The Eighth Circuit's decision in the present case not only repudiates the universal and vitally important principles of public policy discussed in the foregoing cases; its ruling promises to lead to countless miscarriages of justice in False Claims Act cases, whether brought by *qui tam* relators or the Government itself. Present and former government employees, like Dellinger in this case, are often motivated by the strong impulse to deny having been duped or, worse, asleep at the switch. Their testimony, governed at least in part by a desire to avoid any implication that they did anything wrong, must not defeat the Government's False Claims Act recovery as a matter of law, especially in circumstances where it is clear beyond doubt what the Government *should* have done had it known the facts fraudulently concealed.

If a government employee's *actual* knowledge and unauthorized acts cannot defeat a defendant's False Claims Act liability,

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(Footnote 11 continued)

assertion even if true is no defense to plaintiff's claim. The conduct of anyone at HUD authorizing [such] conduct . . . would be ultra vires. . . . If anyone at HUD authorized CRIPPS to violate the contract, Guide or Manual, the person exceeded his or her authority and the government is not bound by the unauthorized acts of its agents.").

then it follows *a fortiori* that a government employee's speculation concerning what he might have done based upon knowledge he never had cannot defeat a defendant's FCA liability. If Dellinger truly would not have approved a termination of the CF&I plan "regardless of any 'fraudulent concealment of the facts,'" even if he had known that by terminating the plan in 1985 the PBGC could have avoided paying the plan's multimillion dollar debt, then his actions would have been both grossly incompetent and outside his and the PBGC's statutory authority under ERISA. Under the holdings of *Hagood, Kreindler, Ehrlich, Kates,* and *Fox Lake State Bank*, even if Dellinger had actually known the concealed facts and had engaged in the *ultra vires* conduct in which he says he would have engaged. Crane would not have escaped False Claims Act liability. The Eighth Circuit's decision, however, permits Crane to escape liability on the basis of Dellinger's conjecture about utterly reckless conduct that *never occurred.*

The Eighth Circuit's ruling holds FCA cases based upon fraudulent omissions hostage to the whims of faithless or negligent government employees or, worse yet, *former* government employees, as in this case. Testimony about what such employees might have done years ago under different circumstances is obviously subject to influence by improper considerations. As a perfect example, in this very case, Dellinger's testimony is readily impeachable on the basis of his own self-interest. As Dellinger himself testified (and reiterated in his unauthorized affidavit), *he* was the PBGC employee responsible for determining whether the CF&I pension plan should be terminated. Yet by Dellinger's own admission, he was so ill-informed with respect to Crane and CF&I that he did not even know about the spin-off until 1987–two years after it occurred.

Dellinger never so much as investigated the possibility of holding Crane liable for any portion of CF&I's unfunded pension liabilities, though he now purports to "know" that there was

no basis for holding Crane liable. It is hardly surprising that Dellinger self-servingly and conclusorily swore—especially in his unauthorized affidavit, safe from cross-examination—that in 1985, during Dellinger's tenure, there was no basis for a plan termination or even for an investigation. This fiasco began and continued for years on Dellinger's watch, no doubt a fact of considerable embarrassment for Dellinger.

The law simply cannot permit a government employee's speculative testimony that he would not have taken the action necessary to prevent the Government's loss (had he or she known the information fraudulently concealed) to defeat the Government's False Claims Act claim for damages as a matter of law. The finder of fact should be permitted to infer reliance when there is circumstantial evidence to support such a finding. Proof of what the Government should have done had it known the facts fraudulently concealed should permit such an inference of reliance, notwithstanding speculative testimony of a government employee to the contrary. The Eighth Circuit's ruling directly conflicts with the overwhelming weight of sound and well-established authority of this Court, of other circuits and state courts, as well. Accordingly, this Court should review the Eighth Circuit's ruling to reaffirm the continued vitality of that authority.

CONCLUSION

It is simply unconscionable that a company like Crane, which coldly and calculatingly implemented a sophisticated scheme to defraud the Government, should be permitted to escape justice and saddle the Government with hundreds of millions of dollars of debt merely because a government employee speculates that he would have acted like a fool—or worse. What the Government *should* have done in the absence of fraud should govern in a False Claims Act case and not a government employee's conjecture that he would have acted irresponsibly and contrary to his statutory obligations and the Government's best interest. The Eighth Circuit's decision to the contrary warrants review by this Court.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3027

Stanley D. Rabushka, ex rel.
United States of America;
Stanley D. Rabushka,
Appellants,

v.

Crane Company,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: March 13, 1997
Filed: August 11, 1997

Before WOLLMAN, MAGILL, and BEAM, Circuit Judges.

WOLLMAN, Circuit Judge.

Stanley Rabushka's *qui tam* suit under the False Claims Act (FCA) against the Crane Company is before us for the third time. After dismissing the first appeal, we reversed the district court's dismissal of Rabushka's suit and remanded the case for further proceedings. *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509 (8th Cir.1994) (*Rabushka I*). Rabushka appeals from the district court's[1] judgment in favor of Crane. We affirm.

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[1] The Honorable Jean C. Hamilton, Chief Judge, United States District Court for the Eastern District of Missouri.

I.

A.

This suit stems from Crane's spin-off of its subsidiary CF & I Steel Corp. to Crane shareholders in 1985. CF & I was a profitable company until 1982, when it began suffering economic difficulties. CF & I maintained for its employees the "CF & I Pension Plan" (the plan), a single-employer defined benefit plan. Crane became concerned in the early 1980s about significant underfunding of the CF & I plan and Crane's potential liability for those unfunded pension obligations should CF & I file for bankruptcy. Unable to find a buyer for CF & I, Crane spun off CF & I to Crane shareholders on May 28, 1985.

We summarized CF & I's financial condition at the time of the spin-off and its subsequent financial history in *Rabushka I*:

> At that time [1985] CF & I's unfunded pension liability was stated at approximately $46 million. CF & I's financial condition worsened after the spinoff, in large part because of its burgeoning unfunded pension obligation. In November 1990, with an estimated $140 million unfunded pension liability, CF & I filed for bankruptcy. In March 1992, when the unfunded pension liability had grown to approximately $270 million, the Pension Benefit Guaranty Corporation [PBGC] terminated CF & I's pension plan and assumed those plan obligations that were protected by the Employee Retirement Income Security Act [ERISA], 29 U.S.C. §§ 1001 et seq.

40 F.3d at 1511.

The PBGC terminated CF & I's plan on March 19, 1992, on the grounds that the plan had not met the minimum funding standards and would be unable to pay benefits when due and because the possible long-run loss to the PBGC could reasonably be expected to increase unreasonably if the plan was not termi-

nated. The PBGC stated that it was terminating the plan "in order to protect the interests of the participants, to avoid any unreasonable deterioration of the financial condition of the Plan, and to avoid any unreasonable increase in the liability of the fund." At the time of the plan's termination, CF & I had not made any funding contributions since July 1990. Its contributions were $39 million in arrears; the plan had $35 million in assets and was paying out $18 million in benefits per year and would run out of money within two years; and the PBGC projected an increase in its exposure of $16 million per year if the plan was not immediately terminated.

B.

Rabushka, a former Crane shareholder, filed a four-count complaint asserting a *qui tam* action under the FCA, alleging that Crane spun off CF & I with the intent of wrongfully shifting its liability for CF & I's unfunded pension obligations to the PBGC.[2] Count I alleged that Crane submitted false or fraudulent pension benefit claims to the PBGC, or caused CF & I to do so, in violation of 31 U.S.C. § 3729(a)(1). Count II alleged that Crane submitted false statements to the PBGC, or caused CF & I to do so, in order to get false or fraudulent pension benefit claims paid by the PBGC, in violation of 31 U.S.C. § 3729(a)(2). Count III alleged a "reverse false claim," alleging that Crane made false statements, or caused CF & I to do so, to the PBGC to conceal Crane's obligation to pay money to the PBGC, in violation of 31 U.S.C. § 3729(a)(7). Count IV alleged that Crane conspired with CF & I and its employees to "defraud[ ] the PBGC by getting the PBGC to pay the false or fraudulent claims for unfunded, PBGC-insured benefits," in violation of 31 U.S.C. § 3729(a)(3). Rabushka's theory is that to avoid being saddled with CF & I's unfunded pension liability, Crane spun off CF & I, knowing that it was bankrupt and would not survive. Crane

[2] All references are to Rabushka's Third Amended Complaint.

hoped that CF & I would survive long enough so that when it did go bankrupt—and the PBGC was forced to terminate CF & I's plan and assume its liabilities–Crane could not be held liable for those obligations.

When a single-employer plan such as CF & I's is terminated, the PBGC assumes responsibility for insured pension benefits. See 29 U.S.C.A. §§ 1322, 1361 (West 1985).[3] For transactions effective before January 1, 1986, the PBGC could assert a subrogation claim against an employer who failed to fund a pension plan, or any trade or business under common control with that employer at the time of termination. In those circumstances, the employer could be held liable for the plan's unfunded obligations or for thirty percent of the employer's net worth, whichever was less. See 29 U.S.C.A. §§ 1301(b)(1), 1362 (West 1985). Crane does not dispute that had the PBGC terminated CF & I's plan at the time of the spin-off, Crane could have been held liable for CF & I's unfunded pension liabilities.

In a notice-of-reportable-event letter dated June 28, 1985, the CF & I plan administrator reported the spin-off to the PBGC as a "transaction involving a transfer of ... an ownership interest in a contributing sponsor," pursuant to 29 C.F.R. § 2515.23(a)(1)(ii) (1985).[4] Rabushka contends that Crane had a duty to report to CF & I's plan administrator that CF & I's spin-off was a transaction to implement CF & I's liquidation under 29 C.F.R. § 2615.22(a)(1985).[5] The CF & I plan administrator would then have been obligated to report this to the PBGC within thirty days, *see* 29 U.S.C.A. § 1343(a) (West 1985); 29 C.F.R. § 2615 (1985),[6] and thus the PBGC would have known at the time of the

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[3] Due to various subsequent amendments, we cite to the 1985 versions of statutes and PBGC regulations applying to this case.

[4] Now codified at 29 C.F.R. § 4043.23 (1996).

[5] Now codified at 29 C.F.R. § 4043.22 (1996).

[6] Now codified at 29 C.F.R. § 4043.3 (1996).

spin-off or shortly thereafter that the transaction was really one to effect CF & I's liquidation, not the spinning-off of a viable company. Rabushka argues that had the PBGC known the true nature of the transaction and the true extent of CF & I's unfunded pension liabilities (also allegedly misrepresented), it would have immediately terminated CF & I's plan in order to avoid an increase in the PBGC's future liabilities and would have held Crane responsible for the unfunded liabilities. *See* 29 U.S.C.A. §§ 1342(a)(4), 1362 (West 1985). Thus, the alleged false claims in this case are the payment of the CF & I plan beneficiaries' claims out of the PBGC's funds rather than out of funds that Crane would otherwise have been required to advance to cover the plan's unfunded liabilities.

C.

The district court granted Crane's motion for judgment on the pleadings on count III, which alleged that Crane could be held liable under the reverse false claims provision of the FCA, 31 U.S.C. § 3729(a)(7). The district court noted that the 1986 amendments to the FCA expressly allowed the government to assert reverse false claims, but concluded that the amendments did not apply retroactively to transactions occurring before their effective date.

The district court granted summary judgment to Crane on counts I, II, and IV. The court concluded that Crane did not prepare or submit any documents to the PBGC about CF & I's plan; that Crane had no duty under ERISA to report any information to the PBGC or to pay for CF & I's unfunded pension liabilities; that Crane could not be held liable under "predecessor liability" or "sham transaction" theories advanced by Rabushka; and that there was no basis for piercing CF & I's corporate veil and holding Crane liable as an alter ego corporation. The court denied Rabushka's subsequent Rule 59(e) motion to alter or amend the judgment.

II.

We review a grant of summary judgment de novo, applying the same standard as the district court: whether the record, viewed in a light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Earnest v. Courtney*, 64 F.3d 365, 366-67 (8th Cir.1995). We recently explained the standard the non-moving party must meet to avoid summary judgment:

> After the moving party points out the absence of evidence to support the nonmoving party's case, the nonmoving party "must advance specific facts to create a genuine issue of material fact for trial." *Rolscreen Co. v. Pella Prods., Inc.*, 64 F.3d 1202, 1211 (8th Cir.1995); *see Celotex* [*Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986)]. A genuine issue of material fact exists if the evidence is sufficient to allow a reasonable jury to return a verdict for the nonmoving party. *See Anderson* [*v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986)]. However, the mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact. *See Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512; *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 81-82 (8th Cir.1996), *cert. denied*, — U.S. ——, 117 S.Ct. 1694, 137 L.Ed.2d 821 (1997); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (explaining that nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts"). After adequate time for discovery and upon proper motion, a court must enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that

> party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

In re: Temporomandibular Joint (TMJ) Implants Products Liability Litigation, 113 F.3d 1484, 1492 (8th Cir.1997).

A.

We affirm the district court's grant of summary judgment to Crane on Counts I, II, and IV for a reason different from those relied upon by the district court. *See Allstate Financial Corp. v. United States*, 109 F.3d 1331, 1333 (8th Cir.1997).

Crane moved for summary judgment on two grounds, arguing that the PBGC would not have involuntarily terminated the CF & I Pension Plan at any relevant time, irrespective of any statement or nondisclosure by Crane, and that Crane did not make or cause to be made any false statement to the PBGC. The district court did not reach Crane's first ground and instead based its decision on the second, stating that:

> The Court declines to reach this [the first] issue for two reasons. First, there is a significant question as to whether the PBGC's Fed.R.Civ.P. 30(b)(6) corporate designee, Royal [Dellinger], was authorized to provide opinions on this subject by way of affidavit after his deposition.[7] Second, Defendant fails to explain how a ruling in its favor on this issue would entitle it to summary judgment as a legal matter. Defendant frames the issue as one of causation. As Plaintiffs correctly note, however, proof of causation of damages is relevant only to recovery of compensatory damages. The absence of such proof does not preclude the assessment of penalties, attorney's fees, and costs. *See Rex*

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[7] We do not consider Dellinger's affidavit in our discussion and need not discuss it further, nor do we need to discuss arguments raised in Rabushka's Fed. R.App. P. 28(j) letter, because they relate only to Dellinger's affidavit.

> *Trailer Co., Inc. v. U.S.*, 350 U.S. 148, 153 n. 5, 76 S.Ct. 219, 222 n. 5, 100 L.Ed. 149 (1956); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir.1991).

(Memorandum and Order at 39 n.9 (May 30, 1996)).

On appeal, Crane again contends that its alleged nondisclosures were immaterial to and had no influence on the PBGC, arguing that

> the PBGC's decision not to terminate the CF & I Plan was in no way dependent upon disclosures or nondisclosures by CF & I or Crane. Therefore, the alleged misrepresentations and nondisclosures attributed to Crane were indisputably not a cause of the PBGC's decision not to terminate the CF & I Plan prior to March 19, 1992.... [The issue] does not relate to "causation of damages". [It] relates to Rabushka's premise—essential to all counts of his complaint—that Crane either (i) caused false or fraudulent claims to be filed with the PBGC or (ii) evaded its obligation to indemnify the PBGC by causing the PBGC not to terminate the CF & I Pension Plan prior to March 19, 1992.

Although Rabushka argues that the facts surrounding this contention are in dispute, he conceded at oral argument that he had no evidence that the PBGC would have terminated the plan in 1985. He also conceded that he would have to prove at trial that the PBGC would have terminated the plan in 1985 had it known the information Crane allegedly wrongfully withheld.

This issue goes to the very heart of Rabushka's claims. If Rabushka cannot show that the PBGC would have terminated CF & I's pension plan in 1985 had it known that the spin-off was a transaction to implement CF & I's liquidation, then there is no false claim because the PBGC's payment of CF & I's unfunded pension liabilities would have occurred regardless of Crane's actions.

B.

To prove his claims under the FCA, Rabushka must show that a claim for payment from the government was made and that the claim was "false or fraudulent." See 31 U.S.C. § 3729(a)(1), (2), & (3); *United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992). Summary judgment is appropriate if the plaintiff lacks sufficient evidence to show that any false or fraudulent claims have been made. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992).

Royal Dellinger, who at the time of his resignation in September of 1989 was the PBGC's principal deputy executive and chief negotiator, gave the following deposition testimony. During the relevant time period, the PBGC's policy was not to involuntarily terminate pension plans unless they were unable to pay benefits when due, or if the plan was abandoned by the employer. Dellinger testified that "[t]he [PBGC] would have been most concerned with the plan's ability to pay its benefits on a timely basis." The PBGC's policy regarding settlements or compromises of a plan's pension obligations prior to termination was that it was done only in those cases where it was clear that termination was inevitable; inevitable termination meant either the potential inability to pay benefits when due or potential abandonment of a plan. Dellinger testified that CF & I's spin-off did not warrant an involuntary termination of the CF & I pension plan, that the spin-off described in the notice of reportable event did not constitute a liquidation for purposes of the notice of reportable event regulations, and that he was not aware of any basis on which the spin-off could be characterized as a liquidation. Dellinger also testified that the PBGC would not terminate a plan based on the conclusion that in some subsequent year the plan would likely not be able to pay benefits when due, because a termination would require a finding that the plan would not be able to pay benefits in the immediate future, which was less than a year.

Dellinger also testified as follows:

Q: In 1985, if the PBGC had determined that it was inevitable that CF & I would be liquidated but that that liquidation would not occur for more than a year, would it have terminated the pension plan?

A: No, it wouldn't have.

Q: And if the PBGC had determined in 1985 that CF & I had been unable to make funding contributions to the plan in the future, more than a year in the future, would it have terminated the pension plan?

A: No, it wouldn't have.

Q: And if the PBGC had determined in 1985 that it was inevitable that CF & I would be unable to make benefit payments when due, but that that event would not occur for more than a year, would it have terminated the pension plan?

A: No, it wouldn't have.

In 1987, CF & I Chairman Crocker Nevin sought termination of CF & I's plan by the PBGC and reported the details of CF & I's current and future financial condition to the PBGC, including the fact that its pension plan was underfunded by $120 million. Dellinger testified that the PBGC did not grant CF & I's termination request because its request was not consistent with the PBGC's policies at the time and that negotiation of a settlement with CF & I prior to termination of its pension plan would also have been inconsistent with PBGC policy. In 1985, CF & I's pension plan had assets of approximately $45 million. Between 1983 and 1985, it was paying out $5 to $6 million per year in benefits. The parties do not dispute that CF & I was always able to pay benefits due until the plan's termination.

In opposition, Rabushka points to Dellinger's further responses:

> Q: If CF & I had stated in the notice of reportable event, the June 28th [1985] letter, that the spinoff constituted a liquidation of the company, would the PBGC have terminated the plan?
>
> A: I don't believe it would have taken action based on that assertion. It clearly would have reviewed the case differently.
>
> Q: And how would it have done so?
>
> A: I think the agency would have initiated an effort to find out if in fact a liquidation was going to occur.

Rabushka also points to the PBGC's 1992 termination of the plan, noting that the plan was terminated even though it could still pay benefits as they came due in 1992. Rabushka argues that this shows that had the PBGC known the spin- off was a liquidation of CF & I it would have terminated the plan in 1985, even if the plan was able to pay benefits due at that time.

Thus, although Rabushka may have a scintilla of evidence in support of his theory, he does not have sufficient evidence to avoid summary judgment. See In re: TMJ, 113 F.3d at 1492. Crane's evidence—the PBGC's policy against involuntarily terminating a plan when it had sufficient assets to pay current benefits, the CF & I plan's ability to pay benefits as they came due in 1985, the fact that the spin-off did not warrant an involuntary termination in 1985, the PBGC's subsequent refusal to terminate the plan in 1987, and the fact that the plan would not have been terminated in 1985 even if the PBGC determined that CF & I's liquidation or inability to make benefit payments was inevitable so long as those events did not occur for more than one year—overwhelmingly establishes that the PBGC would not have terminated CF & I's plan in 1985.

We do not find persuasive Rabushka's speculation, based solely on the PBGC's 1992 termination of CF & I's plan and in direct contradiction of Dellinger's testimony, that the PBGC in 1985 would not have adhered to its policy of not terminating a plan when it could pay benefits due. Even though the plan would have been able to pay benefits due when it was terminated in 1992, the situation in 1992 was vastly different from the situation in 1985. In 1985, CF & I had sufficient credit built up from past funding contributions to relieve it of any obligation to make any minimum funding contributions. In 1992, however, CF & I was $39 million in arrears on its minimum funding contributions. In 1985, the plan had $45 million in assets to pay $5 to $6 million in benefits per year. In 1992, it had only $35 million in assets to pay $18 million in benefits per year. Moreover, given CF & I's 1990 bankruptcy filing and the company's resulting financial situation, the PBGC faced a huge unfunded liability and the potential increase in liability of $16 million per year if it did not immediately terminate CF & I's plan.

Because Rabushka cannot show that the PBGC would have terminated CF & I's plan in 1985, he has not shown the existence of false claim within the meaning of the FCA.

III.

Rabushka argues that in granting judgment on the pleadings to Crane on count III, the district court erroneously concluded that the reverse false claims provision of 31 U.S.C. § 3729(a)(7) is not retroactive. Section 3729(a)(7) was first enacted in 1986 in legislation containing substantial amendments to the FCA. *See* False Claims Amendments Act of 1986, Pub.L. No. 99- 562, § 2(7), 100 Stat. 3153 (1986). We have held that the 1986 amendments to the FCA do not apply retroactively. *See Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 689 (8th Cir.1995); *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, — U.S. ——, ——, 117 S.Ct. 1871, 1876, 138

L.Ed.2d 135 (1997) (noting presumption against retroactive legislation (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994))). Given our conclusion in *Miller*, we cannot apply section 3729(a)(7) to Crane's pre-1986 conduct.[8]

IV.

The district court denied Rabushka's first and second motions to compel discovery. We cannot say that the district court grossly abused its discretion in denying Rabushka's first motion to compel. *See Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir.1995) (standard of review). Nor did the district court abuse its discretion in denying Rabushka's second motion to compel, which challenged Crane's assertion of the attorney-client and work product privileges. Crane met its burden of providing a factual basis for asserting the privileges when it produced a detailed privilege log stating the basis of the claimed privilege for each document in question, together with an accompanying explanatory affidavit of its general counsel. *See Zar v. South Dakota Bd. of Examiners of Psychologists*, 976 F.2d 459, 463-64 (8th Cir.1992) (standard of review). Rabushka argues that some of the documents are not protected because they were prepared by Crane's general counsel when he was acting in his capacity as corporate secretary, not as an attorney. Other than offering speculation based on a sampling of the descriptions of documents listed in the privilege log, Rabushka has offered no

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[8] Rabushka argues that reverse false claims were actionable under the pre-1986 version of the FCA. As the district court noted, however, every circuit considering the issue has rejected Rabushka's position. *See American Heart Research Found.*, 996 F.2d at 10; *United States v. Howell*, 318 F.2d 162, 164-66 (9th Cir.1963); United States ex rel. Kessler v. Mercur Corp., 83 F.2d 178, 181 (2d Cir.1936); *see also United States v. Bornstein*, 423 U.S. 303, 309 n. 4, 96 S.Ct. 523, 528 n. 4, 46 L.Ed.2d 514 (1976) (definition of false claim under FCA that did not include reverse false claims). We find these decisions persuasive, and we adopt their holdings.

evidence to contradict Crane's evidence that the questioned documents were prepared by Crane's counsel while acting in a legal capacity. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir.1995) (district court did not abuse its discretion in determining that communications were for purpose of providing legal advice, based on privilege log, attorney's affidavit, and deposition testimony, and where plaintiff did not submit any evidence to contradict attorney's assertion that he provided legal, rather than business, advice), *cert. denied*, — U.S. ——, 116 S.Ct. 1678, 134 L.Ed.2d 781 (1996).

We also conclude that the district court did not abuse its discretion in denying Rabushka's claim that the crime-fraud applied to the documents requested in his second motion to compel, and in declining to perform an *in camera* review of those privileged documents. Rabushka did not meet his burden of making the necessary threshold showing that any specific document providing legal advice was made in furtherance of Crane's alleged fraud and closely related to it. *See Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 283 (8th Cir.1984) (standard for prima facie case). Rabushka merely offered his general theory that a fraud occurred and asserted that any communications made aided that fraud, a showing that does not satisfy the requirements of the crime-fraud exception or justify *in camera* review. *See United States v. Zolin*, 491 U.S. 554, 572, 109 S.Ct. 2619, 2631, 105 L.Ed.2d 469 (1989) (must be showing of adequate factual basis to support good- faith belief by reasonable person that *in camera* review may reveal evidence to establish claim that crime-fraud exception applies); *Pritchard-Keang Nam Corp.*, 751 F.2d at 282-83 & n. 5 (rejecting argument that report should be discoverable because even if it was not communicated in furtherance of fraud, it was used by client to commit fraud).

Finally, in denying Rabushka's Rule 59(e) motion, the district court also denied Rabushka's separate motion for recusal. *See* 28

U.S.C. §§ 455(a) & (b)(1). We conclude that the district court did not abuse its discretion in doing so. *See In re Kansas Public Employees Retirement Sys. (KPERS)*, 85 F.3d 1353, 1358 (8th Cir.1996) (standard of review). Moreover, because it was not filed until after the district court had granted summary judgment to Crane on the merits of the case, the motion was untimely. *See In re KPERS*, 85 F.3d at 1360 (recusal motion untimely and interposed for suspect tactical reasons, "can and should" be denied on that basis alone); *see also Neal v. Wilson*, 112 F.3d 351, 357 n. 6 (8th Cir.1997) (disapproving of tactic of waiting until after district court issued unfavorable ruling before moving for recusal).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3017EMSL

Stanley D. Rabushka, etc., et al.,
Appellants,

v.

Crane Company,
Appellee.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 16, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 91-420-C-7
Consolidated with
Cause No. 4:92CV514 JCH

UNITED STATES OF AMERICA ex rel.
STANLEY RABUSHKA, and
STANLEY RABUSHKA,
Plaintiffs,

v.

CRANE CO.,
Defendant.

MEMORANDUM AND ORDER

[Filed: May 30, 1996]

This matter comes before the Court on Plaintiffs' Motion for Reconsideration of the Court's December 15, 1995 ruling on their first Motion to Compel; Plaintiffs' January 9, 1996 Motion to Compel Discovery; Plaintiff's February 13, 1996 Motion for Leave to Respond to Defendant's Proposed Surreply Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery; Defendant's Motion for Judgment on the Pleadings; Defendant's Motion for Summary Judgment; Plaintiff's Motion to Strike Royal Dellinger's Affidavit Offered in Support of Defendant's Motion for Summary Judgment; Defendant's Request for Oral Argument; Defendant's Motion to Remove this Case from the Jury Docket and for Trial by the Court; and Plaintiff's Alternative Rule 39(b) Motion for Jury Trial. This case is set for trial on the June 3, 1996 docket.

FACTS

Many of the facts relevant to the pending motions are undisputed. Defendant Crane Corporation (Crane) is a Delaware corporation with its principal place of business in Stamford, Connecticut. At all times relevant to this litigation, Defendant CF&I Steel Corporation (CF&I) was a Colorado corporation with its principal place of business in Pueblo, Colorado. Crane acquired a controlling interest in CF&I in 1969. As of May 28, 1985, Crane owned approximately 96.3 percent of the stock of CF&I.

Between 1950 and 1992, CF&I maintained the "CF&I Pension Plan" (the Plan) for its employees. The Plan was a "single-employer defined benefit plan" within the meaning of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(35). (Ex. 8 to Deft's Mtn. for Summ. Judg.). From 1977 through 1986, Lawrence Hegstrom, the CF&I Personnel and Employee Benefits Manager, served as Plan Administrator. (Ex. 10 to Deft's Mtn. for Summ. Judg., at 5-6). After 1986, CF&I was named as Plan Administrator. (*Id.* at 20-21).

The Plan Administrator had "the responsibility to mange the Plan and act in the interests of Plan participants, and.... [to] carry out its duties in accordance with fiduciary standards of ERISA." (Ex. 8 to Deft's Mtn. for Summ. Judg., at 3). Among other things, the Plan Administrator was required to prepare and submit to the Pension Benefit Guaranty Corporation (PBGC) an Annual Return/Report of the Plan, or Form 5500, 29 U.S.C. § 1023, 29 C.F.R. §§ 2520.103-1, 2611.3; a statement of Actuarial Information on Schedule B to Form 5500, *Id.*; and Notices of Reportable Events (NREs), 29 U.S.C. § 1343, 29 C.F.R. Part 2615. The undisputed evidence shows that Mr. Hegstrom, other CF&I employees, and CF&I's actuaries and accountants were responsible for all PBGC filings concerning CF&I's Pension Plan, and that Crane did not attempt to influence those filings. (Ex. 10, at 6-20, attached to Deft's Mtn. for Summ. Judg.).

Sometime in 1983, Plaintiff Stanley Rabushka, a substantial shareholder of Crane, allegedly learned from Crane's then Vice President-Finance James O'Brien that the CF&I Pension Plan was significantly underfunded. (Ex. 1 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., ¶2). In early 1984, Mr. O'Brien and Crane's then Chief Executive Officer Robert Evans also supposedly told Plaintiff that the pension obligations were sufficient to "sink" Crane, and that Crane was attempting to sell CF&I so as to avoid liability for its unfunded pension obligations, but that no buyer was willing to assume those obligations. (*Id.*). According to Mr. Rabushka, Mr. Evans stated that CF&I's financial statements "did not accurately reflect the actual extent of the pension fund problem." (*Id.*, ¶3).

Because Crane could not find a purchaser for CF&I, Crane's officers and directors considered the possibility of "spinning off" CF&I to Crane's shareholders in the form of a dividend. Mr. Evans conceded during SEC hearings in 1985 that there were problems with spinning off CF&I in February, 1984, because "there was no long-term financing in place." (Ex. 3 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 81). "[G]iving the stockholders a taxable dividend in a bankrupt company wasn't doing them a favor," Mr. Evans stated. (*Id.*). Mr. O'Brien and Crane's former President, Robert Slater, agreed that CF&I would not have been viable in February, 1984 unless it obtained long-term financing. (Ex. 5 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 99-100).

In December, 1983, Crane requested a ruling from the Internal Revenue Service (IRS) regarding the tax consequences of the proposed spin-off of CF&I to Crane's shareholders. Crane allegedly concealed from the IRS its true motive for the spin-off: to evade liability for CF&I's unfunded pension liabilities. (Third Am. Compl., ¶16). By letter of March 20, 1985, Crane again requested favorable IRS rulings on its spin-off, and represented that "financing to fund CF&I's operations as an independent

company is now in place." (Ex. 12 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 3). According to Mr. Rabushka, this representation was false. (Ex. 6 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 54).

On May 14, 1985, Crane voted its shares to elect a new board of directors for CF&I. Five of the eight directors on the new board were also members of Crane's board of directors. (Third Am. Compl., ¶26). On May 28, 1995, Crane "divested itself of all ownership interest in CF&I by distributing all of its stockholdings in CF&I to Crane's shareholders." (*Id.*, ¶27). Crane received no consideration for the spin-off. (*Id.*, ¶28). At least three of the five Crane directors left the CF&I board within one year of the spin-off. (Ex. 13, at 10-11, Ex. 19, at 12; and Ex. 20, at 1, all attached to Deft's Mtn. for Summ. Judg.).

Shortly after the spin-off, Mr. Evans allegedly told Mr. Rabushka that "he did not expect CF&I to survive as an independent company because of the size of the true pension fund obligation." (Ex. 1 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., ¶4). According to Mr. Rabushka, Mr. Evans also stated that "if CF&I could avert a Bankruptcy filing for a few years, he thought that Crane Company could avoid problems as a result of any subsequent CF&I Steel Corp. bankruptcy." (Ex. 2 to Pltf's Corr. Mem. in Opp. to Deft's Mtn. for Summ. Judg., ¶ 14).

Due in part to a collapse in oil prices in 1985, CF&I experienced great financial difficulties following the spin-off. (Ex. 19 to Deft's Mtn. for Summ. Judg., at 2). The Company's active workforce dropped from 5,500 in 1981 to 1,500 in 1986. (Ex. 22F to Deft's Mtn. for Summ. Judg., at 7775). CF&I's Chair-

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[1] Defendant asserts that only one director, Dante Fabiani, remained on both boards one year after the spin-off. (Mem. in Supp. of Deft's Mtn., for Summ. Judg., at 6). The evidence cited by Defendant, however, indicates that a "Mr. Cook" also served on both boards at that time.

man, Crocker Nevin, approached the PBGC in May, 1987, and requested that its Pension Plan be involuntarily terminated. (Ex. 18 to Deft's Mtn. for Summ. Judg., at 42-50). The PBGC refused the request, because its policy at that time was to terminate a plan only if it had been abandoned or if it was unable to pay benefits when due, neither of which was true of the CF&I Plan. (*Id.* at 9-10, 43-44).

In August, 1987, Mr. Nevin again contacted the PBGC, requesting termination of the Plan. (*Id.* at 45-46). Mr. Nevin stated that CF&I had $20 million in unfunded pension obligations, that the company would be required to make $15 million in contributions beginning in 1988, and that CF&I "could not afford even a temporary downturn in the market." (Ex. 23 to Deft's Mtn. for Summ. Judg., at 1-2). Mr. Nevin also stated that the company had a retiree to active employee ratio of 5 to 1. (*Id.* at 2). Once again the PBGC found that CF&I did not meet its criteria for involuntary plan termination. (Ex. 18 to Deft's Mtn. for Summ. Judg., at 47).

CF&I filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on November 7, 1990. The PBGC terminated the Pension Plan with CF&I's consent on March 19, 1992, for the following reasons:

(1) the Plan has not met the minimum funding standard required under Section 412 of the Internal Revenue Code, 26 U.S.C. § 412;

(2) the Plan will be unable to pay benefits when due; and

(3) the possible long-run loss of the PBGC with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated.

(Ex. 13 to Pltf's Surreply Mem. in Opp. to Deft's Mtn. for Judg. on Pldgs. and the Deft's Mtn for Summ. Judg.).

Plaintiff Stanley Rabushka on behalf of the United States filed his Complaint against both Crane and CF&I pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, in February, 1991. (Cause No. 91-420-C-7). Mr. Rabushka alleged that Crane spun off CF&I with the unlawful intent of avoiding CF&I's unfunded Pension Plan liability, and that Crane thereby made a false claim on the PBGC. The Court dismissed the Complaint in October, 1991, finding the CF&I's Pension Plan had not yet terminated, and therefore Crane had not yet made a "claim" on the PBGC within the meaning of the False Claims Act. Plaintiffs appealed the dismissal to the Eighth Circuit Court of Appeals.

After the PBGC terminated CF&I's Plan in March, 1992, Plaintiffs filed a new False Claims Act lawsuit, naming only Crane as Defendant.[2] (Cause No. 4:92CV514 JCH). The Court of Appeals remanded Cause No. 91-420-C-7 in light of the new case, and the two actions were consolidated. Crane moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The Court granted the motion to dismiss for lack of subject matter jurisdiction. The Eighth Circuit Court of Appeals reversed and remanded, finding that this Court did have subject matter jurisdiction.

In March, 1995 the Court granted Plaintiffs' Renewed Motion to Amend the Complaint. On August 4, 1995 the Court dismissed the Amended Complaint for failure to allege fraud with particularity as required by Fed. R. Civ. P. 9(b). The Court also denied Plaintiffs' alternative request for leave to file their Second Amended Complaint, which likewise failed to comply with Fed. R. Civ. P. 9(b).

On September 5, 1995 Plaintiffs were granted leave to file a Third Amended Complaint. Defendant answered the Third

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[2] Because Plaintiffs never have served CF&I Steel Corporation or named this Defendant in any of their subsequent amended pleadings, the Court will dismiss CF&I from this lawsuit. Fed. R. Civ. P. 4(m); 12(b)(6).

Amended Complaint on September 22,1 995. In their Third Amended Complaint Plaintiffs allege that Crane "failed to report or caused CF&I, CF&I's agents or employees and/or the CF&I Pension Plan Administrator"

1) to fail to report to the PBGC substantial reductions in the number of Plan participants for the years 1983-1986, as required by ERISA (Third Am. Compl., ¶¶17, 21, 42, 47);

2) to report falsely inflated numbers of active Plan participants in CF&I's Form 5500 for the years 1983-1985 (*Id.*, ¶¶18, 22, 43);

3) to file false information in support of CF&I's June 28, 1985 report to the PBGC concerning the spin-off, and to fail to report that the spin-off constituted a "transaction that would implement the complete liquidation of CF&I" (*Id.*, ¶40; *see also Id.*, 30-39, 41); and

4) to fail to report to the PBGC large losses sustained by CF&I after the spin-off and the possibility that CF&I would file for bankruptcy protection (*Id.*, ¶¶45-46).

Plaintiffs further allege that Crane's purpose in making the foregoing misrepresentations or omissions, or in causing CF&I or the Plan Administrator to do so, was to evade "an involuntary PBGC termination of the CF&I Pension Plan which would have rendered Crane liable for the CF&I Pension Plan's unfunded termination liabilities well in excess of $200 million." (*Id.*, ¶53; *see also Id.*, ¶¶19, 23, 44, 48, 52, 53).

The Third Amended Complaint contains four counts. In Count I Plaintiffs allege that Crane knowingly submitted false or fraudulent pension benefit claims to the PBGC, or that Crane caused CF&I or CF&I's Plan Administrator to do so, in violation of 31 U.S.C. § 3729(a)(1). Count II asserts that Crane knowingly submitted false statements to the PBGC, or caused CF&I or

CF&I's Plan Administrator to do so, in order to get false or fraudulent pension benefit claims paid by the PBGC, in violation of 31 U.S.C. § 3729(a)(2). In Count III Plaintiffs assert that Crane knowingly made false statements, or caused CF&I or CF&I's Plan Administrator to do so, in order to conceal Crane's obligation to pay money to the PBGC, in violation of 31 U.S.C. § 3729(a)(7). In Count IV Plaintiffs allege that Crane conspired with CF&I, CF&I's agents and employees, and other unnamed co-conspirators to get false or fraudulent claims paid, in violation of 31 U.S.C. § 3729(a)(3).

The Court first will address Plaintiff's discovery motions, then turn to Defendant's Motion for Judgment on the Pleadings and Motion for Summary Judgment. All other motions will be denied as moot.

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S DECEMBER 15, 1995 RULING ON PLAINTIFFS' FIRST MOTION TO COMPEL

On October 20, 1995 Plaintiffs' counsel wrote a letter to Defendant's counsel, requesting certain documents. The letter stated in pertinent part, "If you require that I file a formal motion or request, please let me know and I will oblige." (Ex. 1 to Pltfs' Dec. 5, 1995 Mtn. to Compel). On October 30, 1995 Defendant's counsel requested Plaintiffs' counsel to serve a formal document request pursuant to Rule 34. (Ex. 2 to Pltfs' Dec. 5, 1995 Mtn. to Compel). Plaintiffs served a formal Rule 34 request on Defendant by mail on November 13, 1995. (Ex. A to Pltfs' Jan. 9, 1996 Reply in Supp. of Dec. 5, 1995 Mtn. to Compel).

Plaintiffs filed their first Motion to Compel on December 5, 1995. In its December 13 response to the motion, Defendant argued that the requested documents were protected from discovery by the work product privilege. The Court denied Plaintiffs' motion without prejudice on December 15, 1995, on the grounds that Defendant's time for responding to the November

13 document request had not yet run at the time Plaintiffs filed their motion. The Court also noted that parties seeking to compel discovery must file copies of the relevant discovery requests and responses along with their motion, and that Plaintiffs failed to submit the pertinent discovery materials. (*See* Jan 31, 1994 Admin. Order).

On December 19, 1995 Plaintiffs timely filed their reply in support of their Motion to Compel. Plaintiffs attached to their reply a copy of their November 13 "Request to Produce Pursuant to Rule 34." (Ex. A to Pltfs' Reply in Supp. of Dec. 5, 1995 Mtn. to Compel). After receiving the Court's December 15 Order, Plaintiffs sent a letter to the Court requesting a reconsideration of their motion in light of their reply and the attachment thereto. On April 19, 1996 Plaintiffs reiterated their request for reconsideration by motion.

Plaintiffs argue in their reply that the documents sought in the November 13 Request to Produce are not shielded by the work product privilege. The Court need not reach the merits of the work product issue. As the Court noted on December 15, parties seeking to compel discovery must file the pertinent discovery requests and responses along with their motion. Although Plaintiffs filed the Request to Produce along with their reply, they have not filed Defendant's response to that request, nor have they submitted any competent evidence that Defendant failed to respond to the request.[3] Therefore the Court does not have a

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[3] Counsel's assertion on page 6 of the reply that "To date Crane has failed to serve written objections to plaintiff-relator's document request" is unavailing, for two reasons. First, Defendant's response to the Request to Produce was not due until December 16, rather than November 22 as Plaintiffs contend, since Plaintiffs did not file a formal document request until November 13. Because Plaintiffs served their document request by mail, Defendant had until December 16 to respond or object. Fed. R. Civ. P. 6(e). Second, counsel's bare assertions do not constitute competent evidence.

complete record on which to make a ruling. The Motion for Reconsideration will be denied.[4]

PLAINTIFFS' JANUARY 9, 1996 MOTION TO COMPEL DISCOVERY

Sometime during the spring of 1995 Plaintiffs served their first Request for Production on Defendant. Although Plaintiffs once again failed to attach a copy of their Request for Production to their motion, they did attach a copy of Defendant's June 12, 1995 response, which repeats each document request verbatim. (Ex. 1 to Pltfs' Jan. 9, 1996 Mtn. to Compel). Each request seeks copies of documents used in answering various interrogatories, which themselves are not included in the Court file.

Defendant objected to the requests generally on the grounds of the attorney-client privilege and the work product privilege. (*Id.*, ¶ 2). Defendant also invoked the attorney-client and work

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[4] Even if the Court were to reach the work product issue, it is far from clear that Plaintiffs' motion would be granted. It is true that the party asserting the work product privilege has the burden of setting forth sufficient facts to indicate that the privilege has been properly asserted. *McCaugherty v. Siffermann*, 132 F.R.D. 234, 245 (N.D. Cal. 1990). By objecting generally on grounds of the work product privilege, Defendant probably has not met this burden. Part of the reason for Defendant's blanket assertion of the privilege, however, is the extremely broad scope of Plaintiffs' Request to Produce. Request No. 4, for example, seeks all documents concerning actuarial studies, health care costs, pension costs and expenses, and the profitability of CF&I, during a 15 year period. On its face the request appears to call for the production of hundreds, perhaps thousands, of documents. Defendant can hardly be expected to support a document-by document assertion of the work product privilege given the scope of the request.

If Plaintiffs had filed their first Motion to Compel earlier in the litigation, they could have framed a more narrowly tailored document request to which Defendant could have responded with greater specificity. The discovery deadline has passed, however. Plaintiffs cannot rely on their own tardiness in order to establish a "substantial need" for the assertedly privileged documents. (Reply in Supp. of Dec. 5, 1995 Mtn. to Compel, at 10-11).

product privileges in response to specific document requests. Defendant appended to its response a privilege log describing its basis for asserting the privileges as to 1,744 pages of documents. (Ex. 2 to Pltfs' Jan. 9, 1996 Mtn. to Compel). Each entry states the type of document, its general subject matter, date of production, author, addressee, recipients, privilege asserted, and the basis for the privilege. (*Id.*). Defendant's former General Counsel, Paul Hundt, attests that he prepared the privilege log after receiving each document and determining that it fell within the attorney-client and/or work product privilege. (Hundt Aff., ¶¶4, 5, attached to Deft's Mem. in Opp. to Pltfs' Jan. 9 1996 Mtn. to Compel).

On January 9, 1996 Plaintiffs filed a second Motion to Compel Discovery.[5] Plaintiffs seek an order requiring production of the assertedly privileged documents and requiring attorney Hundt to answer deposition questions which he refused to answer on privilege grounds. Plaintiffs first argue that Defendant failed to demonstrate that "the allegedly privileged communications with Mr. Hundt were in his capacity as general counsel, rather than as some other corporate official." (Pltfs' Jan. 9 1996 Mtn. to Compel, at 1-2). According to Plaintiffs, Defendants also fail to show that any of the assertedly privileged documents were prepared in anticipation of litigation. (*Id.* at 2).

A proper assertion of the attorney-client privilege requires:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication

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[5] On February 13, 1996 the Court granted Defendant's Request for Leave to File a Surreply Memorandum in Opposition to this Motion to Compel. The Court hereby grants Plaintiffs' February 13, 1996 Motion for Leave to Respond to Defendant's Proposed Surreply Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery.

> is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived.

Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 601-02 (8th Cir. 1977), quoting *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950). The work product privilege applies to materials prepared by a party or its representative in anticipation of litigation. For the work product privilege to be applicable, the "probability of litigation must be substantial and the commencement of litigation imminent." *Stauffer Chemical Co. v. Monsanto Co.*, 623 F.Supp. 148, 152 (E.D. Mo. 1985). The party asserting either privilege has the burden of setting forth sufficient facts to indicate that the privilege has been properly asserted. *International Paper Co. v. Fibreboard Corp.*, 62 F.R.D. 88, 93 (D. Del. 1974) (attorney-client privilege); *McCaugherty*, 132 F.R.D. at 245 (work product privilege).

Mr. Hundt attests that aside from his ministerial duties as Secretary of Crane Co. and Recording Secretary of the Board of Directors, his sole duties consisted of providing legal advice to Crane Co. and CF&I. (Hundt Aff., ¶2, attached to Deft's Mem. in Opp. to Pltfs' Jan. 9, 1996 Mtn. to Compel). Mr. Hundt also states under oath that the withheld documents "reflect communications (i) concerned with the seeking or giving of legal advice; (ii) made in confidence; (iii) between lawyers for Crane or CF&I and/or Crane, its directors, officers or management employees or CF&I, its directors, officers or management employees and an attorney acting for Crane or CF&I in a professional capacity; and (iv) related to legal matters." (*Id.*, ¶4). "Where Crane has withheld a document on the basis of the work

product doctrine," Mr. Hundt additionally attests, "the document was prepared by or at the direction of an attorney for Crane in anticipation of or in preparation for litigation at either the administrative or judicial level." (*Id.*, ¶5). Finally, Mr. Hundt states that he is "unaware. . . of any scheme, devised or implemented by Crane, CF&I or their respective directors, officers or employees to defraud the PBGC," that he "did not provide legal advice in furtherance of any fraud," and that he "know[s] of no attorney providing legal advice to Crane or CF&I who did." (*Id.*, ¶¶7-8). The Court finds that Defendant has met its burden of demonstrating sufficient facts to indicate that both privileges have been properly asserted. *International Paper Co.*, 63 F.R.D. at 93; *McCaugherty*, 132 F.R.D. at 245.

Even if Defendant has made a sufficient showing that the attorney-client and work product privileges apply, Plaintiffs argue, the "crime-fraud exception" precludes the invocation of these privileges in this case. "Attorney-client communications lose their privileged character when the lawyer is consulted not with respect to past wrongdoings but rather to further a continuing or contemplated criminal or fraudulent scheme." *In re Berkley & Co., Inc.*, 629 F.2d 548, 553 (8th Cir. 1980). The crime-fraud exception also applies to the work-product privilege. *Cox v. Admin. U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir.), *mod. on other grounds*, 30 F.3d 1347 (1994), *cert. denied*, 115 S.Ct. 900 (1995).

A party invoking the crime-fraud exception to the attorney-client and work product privileges first must make a prima facie showing of a "factual basis adequate to support a good faith belief by a reasonable person. . . . that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *United States v. Zolin*, 491 U.S. 554, 572 (1989). *See also Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 (8th Cir. 1994) (party invoking exception must make "'prima facie showing that the legal advice

was obtained in furtherance of illegal or fraudulent activity'"), *cert. dism'd*, 472 U.S. 1022 (1985), quoting *In re Berkley*, 629 F.2d at 553. Once this threshold showing is made, the court has the discretion to conduct an *in camera* review of the materials to determine whether the crime-fraud exception applies. *Zolin*, 491 U.S. at 572.

> The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

Id.

Plaintiffs attempt to meet their initial burden by presenting evidence of allegedly fraudulent actions and omissions by Defendant concerning the spin-off of CF&I to Defendant's shareholders. For purposes of resolving this Motion to Compel, the Court assumes without deciding that Plaintiffs have demonstrated a prima facie case of a fraud or crime. Plaintiffs, however, have not even attempted to demonstrate a prima facie case as to whether any particular assertedly privileged document or communication was made *in furtherance of* such fraud or crime, as required by *Pritchard-Keang Nam Corp.*, 751 F.2d at 281. "That the fraud merely follows the attorney-client communication does not alone support discovery." *Id.* at 283 n.5. Therefore Plaintiffs fail to make out their prima facie case for the crime-fraud exception.

Even if Plaintiffs succeeded on their prima facie case, the Court in its discretion would deny their request for an *in camera* review, after considering the considerable volume of documents in the privilege log, the lack of information regarding the relative

importance to Plaintiffs' case of the assertedly privileged documents, and the likelihood that the *in camera* evidence would prove that the crime-fraud exception does, in fact, apply. *Zolin*, 491 U.S. at 572. Therefore the Motion to Compel will be denied.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS.

Defendant Crane moves for judgment on the pleadings on the grounds that Plaintiffs' Third Amended Complaint fails to state a claim. A motion for judgment on the pleadings may be brought after the pleadings are closed but within such time as not to delay trial. Fed. R. Civ. P. 12(c). A motion for judgement on the pleadings may raise the defense of failure to state a claim. Fed. R. Civ. P. 12(h)(2); *St. Paul Ramsey County Medical Center v. Pennington County*, 857 F.2d 1185, 1187-88 (8th Cir. 1988). A court should employ the same standard to a motion for judgment on the pleadings as would be employed if the motion was brought under Rule 12(b)(6). *Id.*

A court should not grant a motion for judgment on the pleadings unless the moving party clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law. *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters*, 627 F.2d 853, 855 (8th Cir. 1980) (citing 5 C. Wright & A. Miller, Federal Practice & Procedure § 1368 at p. 690). A court must construe all well-pleaded factual allegations of the nonmoving party as true and draw all reasonable inferences in the nonmoving party's favor. *Id.*

Defendant asserts three grounds for its motion: 1) Plaintiff has failed to allege a "false or fraudulent claim" within the meaning of the False Claims Act; 2) the Third Amended Complaint fails to state a "reverse false claim" under 31 U.S.C. § 3729(a)(7); and 3) claims against the Pension Benefit Guaranty Corporation are not claims against the United States government for purposes of

the False Claims Act. (Mem. in Supp. of Deft's Mtn. for Judg. on Pldgs., at i).

Failure to Allege a "False or Fraudulent Claim"

Count I of the Third Amended Complaint requires proof that Defendant Crane knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Count II requires proof that Crane "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." *Id.* § 3729(a)(2). Count IV requires proof that Crane "conspired[d] to defraud the Government by getting a false or fraudulent claim allowed or paid." *Id.* § 3729(a)(3).

Defendant contends that Plaintiffs have failed to allege that Crane presented or caused to be presented any "false or fraudulent claim," as required by the three foregoing sections of the False Claims Act. Plaintiffs do not assert that Crane itself submitted any false or fraudulent claim to the PBGC. They do, however, allege that Crane caused CF&I's Pension Plan beneficiaries to submit claims to the PBGC, and that those claims were fraudulent because Crane was liable for CF&I's pension benefits. (Third Am. Compl., ¶55-57, 60, 76). For purposes of this motion, the Court must assume the truth of these allegations.

Crane responds that the claims by CF&I's Pension Plan beneficiaries do not qualify as "false or fraudulent claims" within the meaning of the False Claims Act. The Supreme Court has held that a "'claims against the government normally connotes a demand for money or for some transfer of public property.'" *U.S. v. McNinch*, 356 U.S. 595, 599 (1958), quoting *U.S. v. Tieger*, 234 F.2d 589, 591 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956). *See also U.S. v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (False Claims Act applies to "a false statement made

with the purpose and effect of inducing the Government immediately to part with money."); *U.S. v. Rivera*, 55 F.3d 703, 710 (1st Cir.1 995) (court should ask whether "statement has the practical purpose and effect, and poses the attendant risk, of inducing wrongful payment").

The PBGC automatically assumed liability for CF&I's pension benefits by operation of law upon the termination of the Pension Plan. *See* 29 U.S.C. §§ 1322, 1361. Therefore, Crane argues, the pension benefit claims could not have resulted from any request or demand by Crane or anyone else. (Mem. in Supp. of Deft's Mtn. for Judg. on Pldgs., at 6). Moreover, Crane asserts, CF&I's retirees were entitled to the pension payments, and therefore their claims could not have been false or fraudulent. (Reply Mem. in Supp. of Deft's Mtn. for Judg. on Pldgs., at 1).

The Court disagrees with Defendant's analysis. Numerous cases have held defendants liable under the False Claims Act for fraudulently causing innocent third parties to seek payment of statutorily mandated government guaranty or insurance benefits. *See Rivera*, 55 F.3d at 707 ("Although, from [the lender's] perspective, the claim it presented [for federal mortgage insurance benefits] may not have been 'false or fraudulent,' that claim was inflated by defendants' earlier fraud; and the case law allows the United States, in such circumstances, to sue defendants under the FCA for having 'caused' the filing of a 'false' claim against the government."); *U.S. v. Hibbs*, 568 F.2d 347, 350-51 (3d Cir. 1977) (real estate broker who falsified loan application caused innocent mortgagee to submit a false claim for federal mortgage insurance benefits); *U.S. v. Ekelman & Associates, Inc.*, 532 F.2d 545, 551-52 (6th Cir. 1976) (realtor who falsified loan applications caused innocent lenders to submit false claims on mortgages guaranteed by the Veterans Administration and insured by the Federal Housing Administration; *U.S. v. Veneziale*, 268 F.2d 504, 506 (3d Cir. 1959 ("[T]he government, having been com-

pelled to pay an innocent third person as a result of the defendant's fraud in inducing the undertaking, is entitled to assert a claim against the defendant under the False Claims Act."); *U.S. v. Ettrick Wood Products, Inc.*, 774 F.Supp. 544, 550 (W.D. Wis. 1988) ("Since *Veneziale*, government claims based upon false applications for government insurance or guarantees on loans, as to which the government has been required to perform, have been entertained in other jurisdictions and, to my knowledge, have been rejected in none.").

Plaintiffs allege that Crane fraudulently caused CF&I's Pension Plan beneficiaries to submit pension claims to the PBGC, thereby evading its own legal duty to pay the pension benefits. (Third Am. Compl., ¶¶55-57). Plaintiffs also allege that Crane made affirmative misrepresentations and material omissions to the PBGC, or that Crane caused CF&I or its Plan Administrator to make such misrepresentations or omissions, in order to evade its legal duty to pay pension benefits under the Plan. (*Id.*, ¶60). Finally, Plaintiffs assert that Crane conspired with CF&I and other unknown co-conspirators to make affirmative misrepresentations and omissions to the PBGC, in order to avoid paying pension benefits to CF&I's Plan beneficiaries. (*Id.*, ¶¶72-76). Whether or not Crane had a legal duty to assume responsibility for CF&I's Pension Plan and to report accurate information to the PBGC is in part a fact-specific question that is addressed below in conjunction with Defendant's Motion for Judgment on the Pleadings, however, the Court finds that Counts I, II, and IV of the Third Amended Complaint adequately allege a "false or fraudulent claim" within the meaning of 31 U.S.C. §§ 3729(a)(1), (2), and (3). The motion will be denied as to these three counts.

Failure to State a "Reverse False Claim"

Count III of the Third Amended Complaint alleges that Crane made affirmative misrepresentations and material omissions to the PBGC, or caused CF&I or its Plan Administrator to make such misrepresentations and omissions, "to conceal Crane's

obligation to pay or transmit money or property to the PBGC," in violation of 31 U.S.C. § 3729(a)(7). (Third Am. Compl., ¶66). This allegation attempts to state a so-called "reverse false claim," where, instead of obtaining money or property from the government by fraud, the defendant fraudulently pays the government "less than its due." *U.S. v. American Heart Research Foundation, Inc.*, 996 F.2d 7, 8 (1st Cir. 1993).

Crane contends that Count III should be dismissed for two reasons. First, Crane argues, "reverse false claims" were not actionable prior to the 1986 amendments to the False Claims Act which specifically authorized such claims. Second, Defendant asserts, at the time of the events giving rise to this lawsuit, Crane had no "obligation" to avoid, because ERISA did not impose on Crane the duty to pay its former subsidiary's pension benefit claims. The Court will address only the first argument here; the question whether Crane had an obligation under ERISA involves a consideration of the facts which is appropriate only on summary judgment.

Not until 1986 did the False Claims Act expressly authorize the government to seek penalties and damages from defendants who made false or fraudulent statements in order to avoid or reduce their obligations to the government. *See* False Claims Amendments Act of 1986, Pub. L. No. 990562, 100 Stat. 3153 (1986). Every circuit court to consider the question, including the Eighth Circuit, has held that the 1986 amendments do not apply retroactively to transactions occurring before their effective date. *See Miller v, Federal Emergency Management Agency*, 57 F.3d 687, 689 (8th Cir. 1995); *U.S. v. TDC Management Corp., Inc.*, 24 F.3d 292, 298 (D.C. Cir. 1994); *U.S. v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992); *U.S. v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991). *See also American Heart Research Foundation*, 996 F.2d at 9 (government declined to appeal district court's determination that reverse false claim provision of 1986 amendments was not retroactive).

Noting that "'[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result,'" the *Miller* court found no indication in the amendments that they should be applied retroactively. 57 F.3d at 689, quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), in turn quoting *Bowen v. Georgetown University Hospital*, 486 U.S. 204, 208 (1988).

Plaintiffs argue that the pre-1986 version of the False Claims Act permitted reverse false claims. The First, Second, and Ninth Circuits disagree with this position, finding no authority in the plain language of the pre-1986 statute for a reverse false claim. *American Heart Research Foundation*, 996 F.2d at 10; *U.S. v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963); *U.S. ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178, 181 (2d Cir.), *cert. denied*, 299 U.S. 576 (1936). The *Howell* decision relied in part on the following statement by the Supreme Court in a criminal case arising under the False Claims Act:

> While the word "claim" may sometimes be used in the broad juridical sense of "a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty," . . . it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant.

U.S. v. Cohn, 270 U.S. 339, 345-46 (1926) (internal citation omitted), *quoted with approval in Howell*, 318 F.2d at 164-65. The Fifth Circuit in *Smith v. U.S.*, 287 F.2d 299, 304 (5th Cir. 1961), affirmed a judgment for the United States on both false claim and reverse false claim theories, but the issue in that case was not the availability of a reverse false claim, but the effect of an intermediary party between the fraudulent actor and the

United States government. *Id.* ("[T]he False Claims Act applies even where there is no direct liability running from the Government to the claimant.").[6]

As Plaintiffs note, district courts have split on the issue of whether the pre-1986 False Claims Act permitted reverse false claims. *Cf. U.S. v. Lawson*, 522 F.Supp. 746, 750-52 (D. N.J. 1981); *U.S. v. Marple Community Record, Inc.*, 335 F.Supp. 95, 100 (E.D. Pa. 1971); *and U.S. v. Brethauer*, 222 F.Supp. 500, 502 (W.D. Mo. 1963) (all refusing to recognize such claims), *with U.S. v. Douglas*, 626 F.Supp. 621, 628-29 (E.D. Va. 1985); *U.S. v. Gardner*, 73 F.Supp. 644 (N.D. Ala. 1947); *and U.S. ex rel. Koch v. Koch Industries, Inc.*, 1995 WL 812134, at *13-15 (N.D. Okla. October 6, 1995) (all recognizing reverse false claims).[7] The courts recognizing reverse false claims relied primarily on the Supreme Court's statement in *Neifert-White* that the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." 390 U.S. at 232.

Like the First Circuit, the Court finds that the foregoing language was merely dicta. *American Heart Research Foundation*, 996 F.2d at 10. Read in the light of the facts of the case, *Neifert-White* simply stands for the proposition that the False Claims Act reaches "claims, however unconventional, asking the government immediately 'to part with money.'" *American*

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[6] Moreover, the *Smith* court noted that "[t]he false claim resulted, as [defendant] knew it would in the actual payment of Federal funds." 287 F.2d at 304. The Ninth Circuit in *Howell* relied on this language in finding that the *Smith* decision was not contrary to its own conclusion that reverse false claims were not actionable. 318 F.2d at 166.

[7] The *Koch* court cites *U.S. ex rel. Rodriquez v. Weekly Publications, Inc.*, 68 F.Supp. 767 (S.D. N.Y. 1946), in support of its decision to recognize reverse false claims. 1995 WL 812134, at 18 n.18. The *Rodriquez* decision, however, appears inconsistent with the earlier *Kessler* decision issued by the Second Circuit. 83 F.2d at 181.

Heart Research Foundation, 996 F.2d at 10, quoting *Neifert-White*, 390 U.S. at 232. The Supreme Court subsequently reiterated in a footnote that the term "claim" as used in the False Claims Act "normally connotes 'a demand for money or for some transfer of public property.'" *American Heart Research Foundation*, 996 F.2d at 10, quoting *U.S. v. Bornstein*, 423 U.S. 303, 309 n.4 (1976), in turn quoting *McNinch*, 356 U.S. at 599. "In the federal hierarchy, a footnote in a Supreme Court opinion normally outweighs a covey of lower court decisions." *American Heart Research Foundation*, 996 F.2d at 10.

It is true that the Senate Report accompanying the 1986 amendments to the False Claims Act indicated Congress' belief that reverse false claims had always been actionable, and that the amendments were intended only as a clarification:

> [T]he subcommittee added a clarification that an individual who makes a material misrepresentation to avoid paying money owned the Government should be equally liable under the Act as if he had submitted a false claim. The Justice Department testified that recent court rulings had produced an ambiguity as to whether such "reverse false claims" were covered by the False Claims Act, and the subcommittee agreed that such matters should be addressable under the Act.
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> * * *
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> The Supreme Court's opinion in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), indicated that the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." The Committee strongly endorses this interpretation of the act and, to remove any ambiguity, has included this amendment to resolve the current split in the caselaw relating to such material misrepresentations.

S. Rep. No. 99-345, 99th Cong., 2d Sess. 15, 18-19, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266. However, Rep. Hamilton Fish, one of the bill's sponsors, indicated during Floor debates that "[t]he existing failure to cover these reverse false claims is a serious loophole in the present law. 132 Cong. Rec. 22,330 (1986).

Plaintiffs cite Supreme Court and Eighth Circuit decisions recognizing that new legislation reflecting Congress' interpretation of previous legislation is entitled to great weight. *Bell v. New Jersey*, 461 U.S. 773, 784 (1983); *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 380-81 (1969); *May Dept. Stores Co. v. Smith*, 572 F.2d 1275, 1278 (8th Cir.), *cert. denied*, 489 U.S. 837 (1978). *See also Barnes v. Cohen*, 749 F.2d 1009, 1015 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985). Plaintiffs also note that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

Defendant relies on seemingly contradictory statements in other Supreme Court decisions. "[T]he views of one Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight," the Supreme Court has held, "and the views of the committee of one House of another Congress are of even less weight." *U.S. v. X-Citement Video, Inc.*, 115 S.Ct. 464, 471 n.6 (1994) (internal citations omitted). The Supreme Court also has noted that a statement by the sponsor of a bill "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

After careful consideration of the parties' conflicting authorities, this Court finds that *X-Citement Video* provides the more appropriate rule in this case. As the First Circuit noted, "We are

reluctant. . . to give much weight in construing a Civil War statute to Committee views first expressed over 100 years later." *American Heart Research Foundation*, 996 F.2d at 10. Even if the Court were to give great weight to the legislative history of the 1986 amendments, that history is far from unambiguous, because the sponsor's view regarding the availability of reverse false claims conflicts with the committee's view. Accordingly, this Court adopts the reasoning of the reported circuit court decisions, particularly the First Circuit's decision in *American Heart Research Foundation*, and finds that reverse false claims are not actionable under the pre-1986 version of the False Claims Act. Defendant's Motion for Judgment on the Pleadings will be granted as to Count III.

Defendant asserts an alternative basis for dismissing Count III. At the time of the events giving rise to this lawsuit, Defendant argues, Crane had no "obligation" to avoid, because ERISA did not impose on Crane the duty to pay its former subsidiary's pension benefit claims. Because this issue requires consideration of factual issues, the Court declines to resolve it on the bare pleadings. As discussed below, the Court will grant Defendant's Motion for Summary Judgment on the grounds that Crane was not "involved in or legally responsible for the preparation or submission of any false record or statement to the PBGC." (Mem. in Supp. of Deft's Mtn. For Summ. Judg., at 12). Therefore the Court need not decide the last difficult and fact-specific question raised in Defendant's Motion for Judgment on the Pleadings: whether claims against the Pension Benefit Guaranty Corporation are claims against the United States government for purposes of the False Claims Act.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

A moving party always bears the burden of informing the Court of the basis of its motion. *Celotex*, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Anderson*, 477 U.S. at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Id.* at 249.

Defendant asserts two grounds in support of its Motion for Summary Judgment: 1) "It is clear beyond doubt that PBGC's decision not to terminate the CF&I Plan was not caused by any statement or nondisclosure," and 2) "There is no factual foundation for any claim that Crane was involved in or legally responsible for the preparation or submission of any false record or statement to the PBGC." (Mem. in Supp. of Deft's Mtn. for Summ. Judg., at i). The Court first will address the second ground.

Whether Crane Was Involved in or Legally Responsible for Any False Record or Statement to the PBGC.

In support of its second ground for summary judgment, Defendant asserts that Crane neither prepared nor submitted any documents to the PBGC concerning CF&I's Pension Plan. The undisputed evidence supports this assertion. Mr. Hegstrom, other CF&I employees, and CF&I's actuaries and accountants were responsible for all PBGC filings concerning CF&I's Pension Plan, and Crane did not attempt to influence those filings. (Ex. 10, at 6-20, attached to Deft's Mtn. for Summ. Judg.).

Defendant also maintains that any allegedly false statements made by Crane in proxy statements or Internal Revenue Service filings (see Third Am. Compl., ¶¶15-16; 24; 60(c), (d), (e); 66(c), (d), (e)) were never submitted to the PBGC, and the PBGC never relied on them. The documents on their face support this assertion. (Exs. 13, 30-34, attached to Deft's Mtn. for Summ. Judg.).

In their initial Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiffs do not dispute the foregoing facts. Instead, they argue that "Crane fraudulently concealed facts from the PBGC which it had a duty to disclose — namely, that the spin-off of CF&I was a transaction which would implement CF&I's complete liquidation." (Pltf's Corr. Mem. in Opp. to Deft's Mtn for Summ. Judg., at 16). "Crane's claim that it did not prepare for submit the documents which CF&I submitted to the PBGC is simply non-responsive to relator's theory of fraudulent concealment," Plaintiffs argue. (*Id.*). "Moreover," Plaintiffs continue, "while Crane may not have either prepared or submitted documents filed with the PBGC, the evidence is clear with respect to some of those documents Crane knew the true facts yet it did nothing to ensure that CF&I reported those true facts; indeed, it permitted CF&I to file documents with the PBGC which Crane knew to be false." (*Id.*).

"For a nondisclosure to amount to a fraud, a party must first be under a duty to disclose information to another party." *Exeter Bancorporation v. Kemper Securities Group*, 58 F.3d 1306, 1314 (8th Cir. 1995). One court has held specifically that "[t]he False Claims Act does not impose liability for omissions unless the defendant has an obligation to disclose the omitted information." *U.S. ex rel. Milam v. Regents of University of California*, 912 F.Supp. 868, 883 (D. Md. 1995).

The question before the Court, then, is whether Crane had any duty to pay CF&I's pension benefits or to disclose any information to the PBGC. When a "single-employer defined benefit plan" such as the CF&I Pension Plan terminates, the PBGC assumes liability for insured pension benefits. 29 U.S.C. §§ 1322, 1361. If the employer has failed to fund the pension plan, the PBGC may assert a subrogation claim against the employer. *Id.* § 1362. At the time of the spin-off in this case, the PBGC had a right to subrogation from any employer "who maintained a single-employer plan at the time it was terminated," and from any trade or business under common control with the employer at the time of termination. *Id.* §§ 1362, 1301(b)(1); *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F.Supp. 512, 416 (N.D. Ill. 1988). Section 1362 subsequently was amended to confer on the PBGC a right of subrogation on "any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group." 29 U.S.C. § 1362(a) (1986). Because Crane concededly was not a member of CF&I's controlled group on the date the Plan was terminated, § 1362 by its terms imposes no duties on Crane.

In 1986 Congress added a new provision to ERISA, permitting the PBGC to pursue a subrogation claim in cases resembling the present one:

> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.

29 U.S.C. § 1369 (1986). Congress' purpose in enacting § 1369 was to "'provide an explicit prophylactic rule to protect the [PBGC's] insurance program from companies that transfer large amounts of unfunded benefits to a weaker company or that otherwise attempt to evade liability for their pension promises.'" *Pension Benefit Guaranty Corp. v. While Consolidated Industries, Inc.*, 998 F.2d 1192, 1198 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 687 (1994), quoting H.R. Rep. No. 99-300, 99th Cong., 2d Sess., at 279 (1985), *reprinted in* 1986 U.S. Cong. Code and Admin. News 42, 756, 930. Section 1369, however, applies only to "transactions becoming effective on or after January 1, 1986." Publ L. 99-272, § 11013(b).

Although ERISA itself appears to have imposed no obligation on Crane to reimburse the PBGC for CF&I's Pension Plan benefits, Plaintiffs nonetheless contend that Crane had a duty to disclose certain "reportable events" to the PBGC. (See Pltfs' Surreply Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 15). ERISA imposes the following reporting requirements on plan administrators and sponsors:

> Within 30 days after the plan administrator knows or has reason to know that a reportable event described in section (b) of this section has occurred, he shall notify the corporation that such event has occurred. . . . Whenever an employer making contributions under a plan. . . knows or has

> reason to know that a reportable event has occurred he shall notify the plan administrator immediately.

29 U.S.C. § 1343(a) (1985).[8] Reportable events include substantial reductions in the number of plan participants, *Id.*, § 1343(b)(3), and transactions to "implement the complete liquidation" of the contributing sponsor, 29 C.F.R. § 2615.22(a)(1).

Obviously CF&I was an "employer making contributions" within the meaning of 29 U.S.C. § 1343(a). Plaintiffs rely on the following statutory provision to support their claim that Crane also qualified as an "employer making contributions:"

> For purposes of this subchapter [including § 1343], . . . all employees of trades or businesses (whether or not incorporated) while are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

29 U.S.C. § 1301(b)(1). If the term "employer" as used in § 1343(a) includes all trades and businesses under common control, Plaintiffs reason, then Crane as well as CF&I had a duty to notify the Plan Administrator ("and thus the PBGC") of reportable events. (See Pltfs' Surreply Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 15).

The Court agrees with Defendant that Plaintiffs' construction of the term "employer" in s 1343(a) would render superfluous the words "making contributions." (See Deft's Mem. in Resp. to Pltfs' Surreply Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 11). "[I]t is a cardinal and long-revered canon of statutory construction that Congress is not to be presumed to have done a vain thing, namely, using superfluous language." *U.S. ex rel. Harlan v. Bacone*, 21 F.3d 209, 212 (8th Cir. 1994). Moreover,

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[8] Section 1343 was amended in 1989 and 1994. Plaintiffs rest their argument on the 1985 version of this section.

Plaintiffs' interpretation of the statute "would obligate not only Crane, but every subsidiary under Crane's control, to report to the CF&I plan administrator," Defendant notes. (Deft's Mem. in Resp. to Pltfs' Surreply Mem. in Opp. to Deft's :Mtn. for Summ. Judg., at 11 n.4). The Court agrees that "[t]hat result is patently absurd," (*Id.*) The Court therefore finds that Crane was not an "employer making contributions" within the meaning of 29 U.S.C. § 1343(a), and that Crane therefore had no reporting obligations to the CF&I Plan Administrator.

Plaintiffs propose two alternative theories for imposing on Crane a duty to pay CF&I's pension benefits, and presumably, a concomitant duty to disclose certain information to the PBGC. (*See* Pltfs' Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 4-7). First, Plaintiffs urge this Court to adopt the predecessor liability theory recognized by the court in *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F.Supp. 512 (N.D. Ill. 1988). The court in *Harvester* recognized that ERISA's express provision for predecessor liability, 29 U.S.C. § 1369, applies only to transactions after January, 1986. 681 F.Supp at 521. Although § 1362 by its terms applied only to members of a controlled group on the plan's termination date, the court concluded that Congress could not have intended to preclude predecessor liability under § 1362 where a solvent employer simply "delegat[es its] ERISA responsibilities through a sale to an entity incapable of meeting those responsibilities. . . ." 681 F.Supp. at 524.

Second, Plaintiffs urge the Court to find that the spin-off of CF&I was merely a "sham transaction designed to avoid pension liability." The Third Circuit in *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1201-02 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 687 (1994), permitted the PBGC to pursue a predecessor corporation on such a theory. "The sham transaction doctrine, originally developed in the context of tax cases, dictates that the substance and not the form

of a transaction controls the tax consequences triggered by an event." *Id.* at 1201.

Neither the *Harvester* predecessor liability rule nor the *White Consolidated* sham transaction rule has been widely followed. Assuming for the sake of argument that the Eighth Circuit Court of Appeals would recognize these novel theories in a proper case, this Court finds that the present case is distinguishable in several major respects. (See Reply Mem. in Supp. of Deft's Mtn. for Judg. on Pldgs, at 13-14). First, in both cases the predecessor corporation was the employer which had made contributions to its own pension plan. Moreover, the predecessor corporation in both cases continued to be involved in the administration of the plan after the transaction by which it attempted to divest itself of responsibility for the plan. In the present case, CF&I, and not Crane, was the sponsoring employer making contributions to the Pension Plan, and Crane had no involvement with CF&I's Plan after the spin-off. Finally, even assuming that the *Harvester* predecessor liability rule or the sham transaction theory would apply in a subrogation suit by the PBGC, this Court would be loathe to find that these novel theories, first recognized several years *after* the spin-off in this case, would subject Crane to liability under the False Claims Act for failing to make disclosures which, at the time, it could not have known were required.

Although Plaintiffs initially conceded that Crane did not prepare or submit documents to the PBGC (see Pltf's Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 16), in their Surreply Memorandum they assert for the first time that "Crane *did* make misrepresentations to the PBGC." (Pltfs' Surreply Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 11). In support of this assertion, Plaintiffs argue that Crane dominated the affairs of CF&I and that the Court therefore should "pierce the corporate veil." A court may pierce the corporate veil in order to "reach the assets of one or more of the shareholders of the corporation whose conduct has created liability." *Radaszewski by*

Radaszewski v. Telecom Corp., 981 F.2d 305, 306 (8th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993).

The Court agrees with Defendant that Plaintiffs' assertion of an alter ego/corporate veil theory amounts to an impermissible attempt to amend their pleadings by way of a surreply brief. (Deft's Mem. in Resp. to Pltfs' Surreply in Opp. to Deft's Mtn. for Summ. Judg., at 9). Plaintiffs' Third Amended Complaint "alleges no facts that, if proved, would even arguably permit a court to impose liability on [Crane] for the acts of [CF&I] under an alter ego theory." *Resolution Trust Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993). *Accord Cover v. Hemmer*, 901 F.Supp. 872, 883 (D. N.J. 1995) ("when a cause of action seeks to pierce the corporate veil on the basis of fraud, it is subject to the pleading requirement of Rule 9(b)"); *Campo v. First Nationwide Bank*, 857 F.Supp. 264, 271 (E.D. N.Y. 1994) (to establish "control by the parent corporation, plaintiff may not rely on conclusory statements but must allege specific facts showing that it exercised dominion over the subsidiary"). The deadline for amending pleadings to include alter ego allegations has long passed. Defendant has not had an opportunity to conduct discovery or file motions on an alter ego theory, or to respond to Plaintiffs' non-specific citations to a voluminous exhibit. (See Pltf's Surreply Mem. in Opp. to Deft's Mtn. for Summ. Judg., at 13-14, citing to "Ex. 18," an inch-tick exhibit, without specifying page numbers). The Court therefore declines to address the merits of the alter ego theory.

In response to Defendant's assertion that any allegedly false statements made by Crane in proxy statements or Internal Revenue Service filings were never submitted to the PBGC, Plaintiffs simply state that Crane used a "false record or statement to get a false or fraudulent claim paid or approved by the Government," in violation of 31 U.S.C. § 3729(a)(2). "In order for a false statement . . . to 'cause' the submission of a false claim," one court has explained, "the Government would cer-

tainly need to prove that it relied on a false statement. . . . . In the absence of reliance on the false statement, it is difficult to see how the defendant's false statement could have 'caused' the false claim." *U.S. v. Hill*, 676 F.Supp. 1158, 1176 n.25 (N.D. Fla. 1987). Because Plaintiffs present no evidence that the PBGC relied on any fraudulent statements Crane made in proxy statements or IRS filings, Defendant is entitled to summary judgment on this issue.

Plaintiffs have failed to demonstrate a material factual dispute as to whether Crane was involved in or legally responsible for any false record or statement to the PBGC. The Court concludes that Crane in fact had no obligation to assume liability for CF&I's Pension Plan benefits, or to make any disclosures to the PBGC. The Motion for Summary Judgment will be granted as to Counts I, II, and IV of the Third Amended Complaint, and denied as moot as to Count III. The Court need not address Defendant's first ground in support of its motion, that the PBGC would not have terminated the CF&I Plan any earlier than it did, even if it had known that the spin-off would lead to the complete liquidation of CF&I.[9]

ALL OTHER PENDING MOTIONS

The Court's rulings on Defendant's Motion for Judgment on the Pleadings and Motion for Summary Judgment have disposed

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[9] The Court declines to reach this issue for two reasons. First, there is a significant question as to whether the PBGC's Fed. R. Civ. P. 30(b)(6) corporate designee, Royal Dalton, was authorized to provide opinions on this subject by way of affidavit after his deposition. Second, Defendant fails to explain how a ruling in its favor on this issue would entitle it to summary judgment as a legal matter. Defendant frames the issue as one of causation. As Plaintiffs correctly note, however, proof of causation of damages is relevant only to recovery of compensatory damages. The absence of such proof does not preclude the assessment of penalties, attorney's fees, and costs. *See Rex Trailer Co., Inc. v. U.S.*, 350 U.S. 148, 153 n.5 (1956); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

of this case. Therefore all other pending motions will be denied as moot.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendant CF&I Corporation is DISMISSED *sua sponte* pursuant to Fed. R. Civ. P. 4(m). 12(b)(6).

IT IS FURTHER ORDERED that Plaintiffs' Motion for Reconsideration [docket #0, filed April 19, 1996] of the Court's December 15, 1995 ruling on their first Motion to Compel is DENIED.

IT IS FURTHER ORDERED that Plaintiff's February 13, 1996 Motion for Leave to Respond to Defendant's Proposed Surreply Memorandum in Opposition to Plaintiffs' Motion to Compel Discovery [docket #145 in Cause No. 91-420-C-7 and docket #22 in Cause No. 4:92CV514] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' January 9, 1996 Motion to Compel Discovery [docket #134] is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Judgment on the Pleadings [docket #139] is GRANTED as to Count III of the Third Amended Complaint, and DENIED in all other respects.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [docket #141] is GRANTED as to Counts I, II, and IV of the Third Amended Complaint, and DENIED as moot as to Count III.

IT IS FURTHER ORDERED that all other pending motions are DENIED as moot.

An appropriate Judgment will accompany this Memorandum and Order.

Dated this 30th day of May, 1996.

/s/ Jean C. Hamilton
UNITED STATES
DISTRICT JUDGE

APPENDIX D

[2]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3027

STANLEY D. RABUSHKA, ex rel.,
UNITED STATES OF AMERICA;
STANLEY D. RABUSHKA,
Appellants,

vs.

CRANE COMPANY,
Appellee.

Transcription of Tape on behalf of the Appellants at the offices of Gore & Perry Reporting, 515 Olive, in the City of St. Louis, State of Missouri, on the 16th day of August, 1997 before Rebecca Brewer, Registered Professional Reporter and Notary Public.

Gore & Perry Reporting Co.
St. Louis, Missouri
(314) 241-6750 621-4790

[3]

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Before Wollman, Magill, and Beam, Circuit Judges

[4]

MR. KING: The case was filed — terminate CF&I's pension plan, which is what the whole case revolves around. In March of 1992 the PBGC did terminate that plan and this court sent the case back to the District Court at that time. There was a change of counsel which caused a short delay but thereafter we were authorized to issue summons and serve the summons and complaint on Crane. Crane filed a motion to dismiss, which was briefed, fully briefed, by the end of 1992 and the District Court didn't rule on that until June 1 of 1993, at which time —

THE COURT: You said at the outset normally this would have been heard in St. Louis but because of the composition of the Court we put it here?

MR. KING: Yes.

THE COURT: We appreciate your willingness to come here. Well, all of you.

MR. KING: We appreciate your willingness to hear us again. The case languished for about six months. Well, not languished. It was pending on the motion to dismiss, no discovery took place during that period of time. Crane repeatedly asked for extensions of time to respond to our outstanding discovery requests so then the case was [5] dismissed in June of '93. No discovery, obviously, took place after we took the appeal and this panel reversed in November of 1994. I'd like to take just a few moments now to update you on what has happened since that time. After you sent the case back to the District Court we had our first and only pretrial conference in May of 1995. That pretrial conference, Judge Hamilton put us on an unbelievably expedited case management order. We were — at that point in time, the case was not even at issue, we had a complaint on file, the defendant had a Rule 90 motion to dismiss for lack of — for failure to plead fraud with particularity, and that motion wasn't even granted until three months after the pretrial conference on August 4th of 1995. That was less than 30 days before we were supposed to serve our notices of expert witnesses and their written disclosures, their written reports, on Crane Company.

Crane had never filed an answer in this case at that point in time. We filed that report, that expert disclosure and the reports, in August of 1995 and about a week later we filed our third amended complaint, the complaint that's now before the Court in this appeal.

[6]

Crane filed its answer to that on September 22nd, which was exactly three months and one week before we were supposed to complete all discovery in this pension fraud case, a very complicated case. We completed the discovery best we could by the end of 1995, the beginning of 1996, and January of '96 Crane filed its motions for summary judgment and judgment on the pleadings.

Now, the case wasn't set for trial until June 3 of last year and less than two full court days before that trial setting Judge Hamilton granted the motion for summary judgment on three of our four counts and granted judgment on pleadings on Count III of the complaint and that ruling is what brings us here today.

After Judge Hamilton granted the motion for summary judgment and after she granted the judgment on the pleadings on Count III we wiled a motion for reconsideration. I should also say in that same order she took up two discovery matters which we've also raised on appeal. As many issues there are on appeal I don't anticipate that I'll have time to get to those discovery issues but I would ask that the Court take those into consideration. We filed a Rule 59-E motion asking the Court to reconsider. [7] That motion was denied as well as a motion for recusal that we filed about that time this past September.

The striking thing about Judge Hamilton's grant of summary judgment in this case is that Judge Hamilton granted the summary judgment without discussion of the plaintiff's evidence. Normally I would not take the time to belabor the point of the standard of review on a motion for summary judgment. The standard review of a motion for summary judgment in the District Court and this court is the same. This court reviews that grant of summary judgment De Novo and what the District Court did in this case was to look at Crane's evidence and never did bother to discuss our evidence.

Our evidence in this case is to be believed by the District Court, all justifiable inferences are to be drawn in our favor, and all of the evidence is to be viewed in the light most favorable to the non-moving party. That was never done in this case. Nobody discussed our evidence and really on this appeal Crane, except for nit-picking pieces of evidence in isolation, has still failed to analyze the evidence in the fashion [8] that it's supposed to on a motion for summary judgment and explain to this court or to relator why summary judgment was appropriate.

THE COURT: What material facts did Judge Hamilton find that are contrary to the facts that you resent or alleged?

MR. KING: Judge Hamilton found that Crane did not in any way influence the filing — CF&I's filings with the PBGC. Judge Hamilton made the finding that Crane was not responsible for nor did it influence CF&I's filings with the PBGC.

THE COURT: Well, she certainly found that Crane wasn't responsible.

MR. KING: Correct.

THE COURT: I didn't read that she found that it didn't influence it.

MR. KING: I believe she did use that language on both of her orders but I know she did for sure in her September 3 order denying the Rule 59-E motion.

THE COURT: Well, did you have evidence that they did?

MR. KING: Well, we had several theories of the case and with —

THE COURT: Several theories but did you [9] have evidence?

MR. KING: Yes, we did, Your Honor, and I can't address each of the separate theories but I would like to highlight the two that I think are the easiest and the most important to discuss on the appeal and the first of those would be our conspiracy count. That was Count IV of the complaint. We alleged that there was a conspiracy between Crane and CF&I to defraud the PBGC. Now, what was our evidence on that? Well, let me take two seconds to address a simple, new ensemble of conspiracy claims.

As we pointed out in our brief, I believe it's in our reply. Crane's burden on its motion for summary judgment with respect to the conspiracy count was to establish the absence of an

agreement to participate in the conspiracy. That's its burden. If you go back to the Adickes versus SH Crest case, the U.S. Supreme Court on summary judgment, that was a conspiracy case. It's discussed in a recent circuit court opinion which we cited to the Court and what the Adickes Court said was that in a conspiracy claim like that that [sic] moving party has to — bears the burden of foreclosing the possibility of a conspiracy. **[10]** That's a pretty heavy burden, even on a motion for summary judgment. What happened in that case was a police officer's mere presence in a restaurant at a time some black students were denied service was sufficient evidence to infer a conspiracy between that police officer and the restaurant owner to deny those black students civil rights. That was sufficient evidence, so it was not a —

THE COURT: What was it you cited?

MR. KING: The Adickes Court, the Supreme Court. The evidence in this case is certainly sufficient to meet that kind of a standard, Crane and CF&I, and we've cited this evidence throughout our brief, knew that CF&I could not possibly survive the spinoff, the May, 1995 spinoff when Crane spun CF&I off with shareholders, for which it received no consideration, it knew and CF&I knew, that shared corporate officers and directors.

They knew that Crane's purpose — and this comes out in some of the SEC testimony on the case. They knew that Crane's purpose was to evade its ERISA liability for CF&I's unfunded pension obligations. We have evidence of that.

We have evidence consisting of the conversations between Mr. Rabushka and the CEO of **[11]** Crane, which his name is Robert Evans. We also have discussions that he's had with James O'Brien, who was then the treasurer of Crane, both of whom were also officers and directors at various times of CF&I Corporation. Crane and CFI [sic] knew that CF&I's unfunded

pension liabilities were sufficient, not just to sink CF&I but if Crane was held responsible for them it would sink both of them: sink CF&I and Crane.

They had to know that if Crane didn't pay there was only one other source that was going to pay for these unfunded pension liabilities and that's the PBGC and that's exactly what happened in this case. The PBGC has assumed, it's come out through testimony in this case, $222 million worth of unfunded pension liabilities, unfunded liabilities that Crane should have been held responsible for but for the fact for its non-disclosure to the PBGC and CF&I's non-disclosure to the PBGC that the spinoff was going to completely liquidate CF&I and that was something that Crane, CF&I, were obligated under PBGC regulations to disclose to the PBGC; that the spinoff was going to completely liquidate CF&I.

Now, another theory of liability that we [12] pursued in the District Court in this case is an alter ego liability, piercing the corporate veil theory of this case. As the court said in 1985 — excuse me?

THE COURT: When was this claim asserted?

MR. KING: This claim was asserted in the complaint, that was — well, that's what Crane says, Your Honor. What happened with the alter ego theory is that the way that it was briefed initially, we did not — we were not addressing that. Crane was discussing in its motion for summary judgment whether or not it was liable under the particular provision of erisa [sic] whether it had any duty to report reportable events under erisa. [sic] We were addressing that issue. There was no challenge to what we had pleaded and had pleaded a plethora of facts about how Crane and CF&I were interrelated and their domination by Crane of CF&I so when they filed their reply brief and they said, okay, that's the only thing they're relying on, well, we were responding to what Crane had said in its brief and when

they said that then we came back to the District Court, asked for permission to file a sort of reply brief, and said, well, no, that's not our only theory of liability and we raised at [13] that time the alter ego theory.

THE COURT: That was in 1996?

MR. KING: Correct. All this briefing took place in the first half of 1996. I believe it was all completed by April, all of the briefing was completed on disposited motions by April.

With respect to this alter ego theory this court has said in the Throat (phonetic) case, which we cited in the 1985 decision, courts will disregard corporate form whenever necessary to prevent fraud or achieve equity. There's no litmus test in federal courts on piercing the corporate veil. One of the cases that Crane cited in the District Court, which it has tried to distinguish in this court, is the 11th circuit decision in Connors Steel.

We've taken that case because Crane argued that we didn't meet the factors that it outlines for piercing the corporate veil in the District Court and we've shown, we have evidence, we've got many citations through the record of evidence of eight of those twelve factors. I'll just run through those real quickly for the panel. The first of those Connors Steel factors is that the parent and subsidiary have common stock ownership. [14] Crane owned 96.3 percent of CF&I.

Number two, they share common directors and officers. There's no dispute that Crane and CF&I shared common directors and officers. Number three, they; ;have common business departments. Our evidence on this one ties in with No. 11, which is also that the daily operations are not kept separate so I'll just discuss those together. Crane assisted CF&I in arranging major financing. Crane made all short-term investments of cash for CF&I. Crane handled all of CF&I's insurance purchases. Crane's legal department coordinated and reviewed in Crane's language all of CF&I's significant legal proceedings.

THE COURT: You have to prove that Crane dominated and controlled CF&I with respect to CF&I's filing with the pension board?

MR. KING: I don't think so, Your Honor. What happened in this case and I think it's unclear from the testimony whether the plan administrator himself was in the dark about all of this or whether or not he was in on all of this and he certainly isn't going to admit that and didn't in his deposition testimony but regardless of whether **[15]** he was in on it or just in the dark, it was through Crane's domination of CF&I, its control of the information, that CF&I should have had the information that the plan administrator should have had that Crane was successful in keeping the information from the PBGC. The information namely being — it's not our only theory in this case but it's what we're talking about on this appeal but the spinoff would completely liquidate CF&I.

THE COURT: What was the (inaudible) of the PBGC in this prepared affidavit or deposition?

MR. KING: Well, what we had there, Your Honor, is after the December 29th cutoff there was an affidavit from Royal Dellinger. He was the PBGC representative who the PBGC put up in response to the 30(b)(6) notice. In his deposition he testified that if he had known at the time that the PBGC had known back in 1985 that the spinoff would liquidate CF&I his words were that they would take a different look at this case. What they did in fact was nothing. What he said in his deposition is they'd take a different look at the case. I don't know what happened between that time when he gave that testimony under oath and what happened when he gave an affidavit later in 1996, but he came in and **[16]** he said in his affidavit they would not have terminated that CF&I — PBGC would not have terminated that CF&I plan no matter what, including, if you look at his affidavit, if they had known there had been fraud.

That affidavit I submit to the Court and it was the subject of a motion to strike in the District Court which was denied as moot, never became an issue, certainly an inappropriate basis for granting summary judgment in this case. Furthermore, the PBGC, and we've included this in the addendum to our reply brief, disavowed Mr. Dellinger's affidavit that he gave in violation of federal regulations.

In addition, with respect to the issue that he was testifying about in March of 1992 — or let me back up. In his deposition Mr. Dellinger said that the PBGC policies and practices with regard to terminating pension plans had never changed while he was at the PBGC and didn't change at any time thereafter. In March of 1992 the PBGC terminated the plan because the long-term risks to the PBGC outweighed — there was an unreasonable risk of high cost to the PBGC. I don't have the exact language yet. Here it is in our brief and it's [17] part of the addendum when they terminated the plan, their notice of termination.

Point is: Mr. Dellinger's testimony was not the only evidence on this issue. We have what the PBGC, in fact, did when it terminated the plan in March of 1992. His deposition testimony does not support what he said in his affidavit later so I think I have addressed your question, Your Honor.

THE COURT: Thank you. Stepping back to your alter ego theory —

MR. KING: Yes.

THE COURT: Common directors and officers. It is your position that if there is any intermixing, that's enough —

MR. KING: Absolutely not, Your Honor. I think that under the teachings of the Connors Steel case and under the cases this court has decided the courts throughout the country are, I think, clear that not any one single factor is enough to pierce the

corporate veil — oh, I suppose there may be circumstances where a factor may be enough all by itself.

THE COURT: You missed my —

MR. KING: I'm sorry.

THE COURT: — question. As I read the **[18]** briefs when the spinoff occurred there were several of the Crane directors on the CF&I board.

MR. KING: Correct.

THE COURT: In the first year several of those fell off and so I assume that the CF&I board was made up mainly of non (inaudible) directors, there was some officer interchanging, so my question is: Was that enough? My impression is that there has to be a pervasive control of the board of directors and the officerships for that to be a usable factor in alter ego. Am I wrong on that?

MR. KING: I think if you look at the Connors Steel case they talked about four of the factors being present and five or six partially present. Certainly, if you had a board that was dominated for a long period of time that stronger proof of that first element then, say, fewer officers and directors, common officers and directors, for a shorter period of time. I don't think that that means that you don't have it in the one case and you do in the other.

It's maybe stronger in one case and be more — lay more heavily in favor of piercing the corporate vile in that case. In our particular **[19]** case what happened is right before the spinoff a majority of directors on the new CF&I board were Crane members and they were there for about a year. But as you say, they did drop off at that — at a later time.

However, here's an important thing I want to point out to the Court and I'll just make this point and then I want to reserve the balance of my time for rebuttal.

The alter ego theory that we're relying on goes up until the time of the spinoff. After the spinoff there's no longer, at least on its face, a corporate relationship and there we're relying on the language of that False Claims Act, which talks about causing to be presented a false claim or a false record and what they had done in their domination of CF&I prior to that time continued and had lasting effects after the spinoff.

I would ask that the Court reverse the motion for summary judgment and a judgment on the pleadings and we'd also ask that because of the pretrial management in this case that the case be assigned on remand to a different judge. Thank you, Your Honor.

MR. DODYK: May it please the Court, my **[20]** name is Paul Dodyk and I am counsel to the Crane Company and I come here this afternoon to urge Your Honors to affirm the dismissal of the action below by Judge Hamilton. Obviously, in this case there's far more to be said than I could possibly say in 30 minutes, there being so many issues, but if I had to narrow it down I would want to make two point points to Your Honors. One is the factual point and one is the legal point and the factual point that I would make is that as this case appears before this court Plaintiff's factual allegations have been narrowed to the assertion that some Crane officers allegedly held an opinion that CF&I would at some time after the spinoff fail.

All of the other factual allegations we have before the case when this case was here a couple of years ago have disappeared and the factual allegations have been narrowed to an allegation about the alleged opinion of certain Crane officers.

THE COURT: And that is?

MR. DODYK: That opinion —

THE COURT: The facts are enough — they say or Rabushka says to support a conspiracy theory?

[21]

MR. DODYK: Well, let me get to that in a moment. As I understand their argument on conspiracy, Your Honor, it is — they rely on two facts. One is that alleged knowledge or opinion on the behalf of the Crane officers and the other is the fact that they allege that there was a non-disclosure of that fact or that opinion to the PBGC.

Now, Judge Hamilton found that Crane was under no obligation to make any disclosure whatsoever to the PBGC of any kind so that the non-disclosure by the Crane officers itself is as consistent with their view that they had no obligation to disclose and in any event the knowledge in and of itself says nothing about whether or not they agreed with the CF&I officers not to make any disclosure about the spinoff.

Now, as Your Honors know there are opinions in the Supreme Court and in this circuit that say that alleged knowledge is not enough to support an inference of conspiracy and there are cases in this court and I think the recent decision of this court in the City of Omaha case that inaction by a party is not enough to support an inference of conspiracy.

[22]

There is not one single shred of evidence in this case that anyone on behalf of Crane attempted to influence any CF&I filing. That's a finding by the district judge not contested by my worthy adversary counsel before this court and there is absolutely no shred of evidence that anyone agreed with CF&I about any filing and no one has said anything about that here today; a digression into conspiracy, but my second point that I wanted to

make apart from the factual point is the legal point and that legal point is that there are six alternative ways of affirming the dismissal below, which are separate and logically independent of one another.

First, of course, the Court may affirm the dismissal squarely on the grounds of the opinion below, we trust that on Judge Hamilton's decision that Crane had no obligation to disclose anything to the PBGC and that there was no evidence sufficient of conspiracy or alter ego and, of course, that so-called reverse false claims were not actionable before October 27, 1986.

Second, the Court may affirm dismissal on the grounds that Plaintiff's allegations do not allege an actionable false claim, that's a **[23]** complicated argument, and it has been set forth in our brief at some length. Third, and this goes back to my factual point, the fact that Plaintiff's allegations have now been narrowed to the alleged non-disclosure of a Crane officer's opinion about the future financial prospects of CF&I means that the non-disclosure cannot constitute a fraud because in federal law the non-disclosure of an opinion as to a future fact does not constitute a fraud except in certain rare circumstances which are not present in this case.

Third, the uncontested evidence, not only the affidavit of Mr. Dellinger but his deposition, is squarely supportive of the proposition that the PBGC did not terminate the CF&I plan and would not have terminated the CF&I plan because its policy was at all relevant times to terminate those plans only when they were not able to pay the beneficiaries payments when due.

At the time of the spinoff the CF&I plan assets were $45 million and the payments were running at a rate of $5 million a year. Those facts, combined with the deposition of Mr. Dellinger, who was the deputy executive director of the PBGC with responsibility for **[24]** termination at the time, he said under those circumstances we would never have terminated and bear in

mind that there had been no evidence produced by Plaintiff by anyone who says that the PBGC would have terminated if it somehow had looked further into the matters which were disclosed and I submit to Your Honors that in this case the plaintiffs, the theory of Plaintiff's case, includes as a necessary precondition to any claim against Crane, proof that the PBGC would have terminated the CF&I plan but for the non-disclosure of the alleged opinion and if you read, Your Honors, the Dellinger deposition he says at least six times in that deposition we would never have terminated the plan because they had enough assets to pay the pensions as they came due and we did not terminate under those circumstances so I say that a fifth — I should say a fourth ground for affirmance here, independent ground for affirmance, is that Plaintiff failed to prove that the PBGC would have terminated the plan but for the non-disclosure of this alleged opinion.

THE COURT: Do I understand you to say that if Mr. Evans, I think that was his name, from Crane had himself —

[25]

MR. DODYK: Yes.

THE COURT: said to the top official of the Benefits Guarantee Board we're spinning this off because we think it's going to go — CF&I's going to go broke and we don't want to be saddles with these pension responsibilities that there wouldn't have been a cancellation of the plan, even under those circumstances?

MR. DODYK: That's absolutely right and the reason for that is the following, Your Honor. At the time CF&I was an operating, solvent, stable company. It had encountered financial difficulties but, don't forget, it continued to operate from the spinoff in May of 1985 until 1990 before it was forced into bankruptcy. It had a plan with $45 million in assets and $5 million in liabilities, or I should say annual payments, not liabilities.

Under those circumstances the PBGC would never have terminated the plan because their assessment would have been as long as this plan's able to pay its benefits and as long as there is a chance this isn't going to work out, we're not going to terminate it. The reason why that's the case is the termination of a plan involves very serious adverse consequences for people who are **[26]** currently covered by the plan. It cuts off their pension plan. It's not the think that the PBGC would wish to do in the interest of the people who are still accumulating credit under the pension plan and also bear in mind in the mid-1980's the entire Steel industry, like CF&I, was having a lot of difficulty and the PBGC was very worried about assuming financial responsibility for all of these plans. The answer — I'm sorry?

THE COURT: You're suggesting that they may have tried to do something else but that they wouldn't have cancelled the plan?

MR. DODYK: They wouldn't have terminated.

THE COURT: Under the FCC or some other agency to keep them from spinning this off.

MR. DODYK: Well, they couldn't do that. They couldn't keep Crane from spinning off CF&I. There is no federal regulation which prevents a corporation from spinning off a subsidiary. You don't have to get permission to spin off a subsidiary. That's something which you're entitled to do and there's no federal or state restriction on that and that's what Crane did; it spun off CF&I, and if you read the complaint, unnecessary condition of any action against Crane by the PBGC, **[27]** and of this boot strap False Claims Act is a decision to terminate.

Now, I should also say there's nothing peculiar about the affidavit of Mr. Dellinger. It was written in clarification of the deposition. There's o inconsistency and I would point out to

Your Honors that the deposition itself, at Page 415 of the Crane appendix, Mr. Dellinger says that so long as we came to the conclusion that CF&I would not be liquidated within 12 months after the spinoff we would not have terminated it.

That statement alone takes any possible ambiguity I suggest to you out of the question and answer which Plaintiff's counsel relies on.

THE COURT: What did Dellinger testify to with respect to the claims regarding proxy statements and IRS —

MR. DODYK: I don't believe that the deposition involved those subjects, Your Honor.

THE COURT: Was there testimony on no reliance?

MR. DODYK: No, there was no testimony on no reliance. Those documents are not filed with the PBGC. There was no indication that we came across in discovery that they every received **[28]** those statements. Part of our motion to dismiss and for summary judgment, which Judge Hamilton accepted, was the fact that the statements which they challenged, which were made to the IRS or the FCC, were not proven to have been made to the PBGC, and since this whole lawsuit revolves around how the PBGC would have reacted to a statement which was not made to it the filings of other government agencies who I think are appropriately deemed irrelevant for wont of any proof of reliance by the plaintiff.

Parenthetically — well, let me move on. I have tried to articulate four different methods for affirmance which I believe are logically independent. The fifth, which I believe is also an available method for affirmance to this court, is the theory based in Danielson and Doubleday and this court's opinion on Premandjra (phonetic), which we gave to Your Honor in the 28-J filing and daily to the effect that since Plaintiff is basically asserting violations of — alleged violations of ERISA reporting

in contribution requirements, and since ERISA defines a comprehensive system of requirements with limitations and generally authorizes the PBGC to **[29]** enforce ERISA that a False Claims Action, such as this one, which complains of alleged violations where it can only be termed highly technical ERISA reporting requirements and a violation of an alleged contribution obligation on the part of Crane cannot be brought under the False Claims Act because to do so, to allow private party to do so would interfere with the purposes of ERISA and with the enforcement of that act by the PBGC.

I submit to Your Honors that your opinion in Premandjra is squarely applicable to the facts of this case. And, sixth, we have argued and is available to this court for affirmance is that I don't believe that the PBGC constitutes the government as that term is used under the False Claims Act.

Now, the reason that I'm — I say that this is one of the most important things that I will say is that all of the focus that you have here on conspiracy and alter ego, much as I think Plaintiff's positions on those are not properly grounded, ultimately make no difference to any of the other five avenues for affirmance.

Now, Your Honors, I had in mind and I seek some guidance because of the complexity of the case **[30]** and the limits of time. I had in mind to explain to Your Honors my view of why the record before the Court in terms of the factual allegations has been narrowed down to the assertion that Plaintiff's — the plaintiff's factual assertion about Crane's non-disclosure boils down to the non-disclosure of the alleged opinion of certain of its officers that CF&I would not survive for a long time after the spinoff and that characterization of his factual allegations is import to, obviously, at least one of the grounds for affirmance, which is that the non-disclosure of such an opinion cannot constitute a fraud under federal law. But before the Court this afternoon Plaintiff's counsel made no effort to suggest that there was any other misleading that was done by Crane or CF&I and

there were in the briefs suggested only two other possible misleading statements, one of which had to do with the employee count which was submitted by CF&I to the PBGC and I believe that I have demonstrated in our brief that there is absolutely no basis for suggesting that that was false or misleading in any sense because Plaintiff's entire argument rests on a comparison of employee reports which were inclusive of laid off personnel with **[31]** other counts which were exclusive of laid off personnel.

The numbers are, of course, different but they're both correct and the record establishes without question that CF&I submitted to the PBGC its annual evaluation report which disclosed the employee counts to the PBGC inclusive and exclusive of laid off personnel and that document alone, I think, demonstrates that there is no basis for any claim that the employee counts for not properly reported. The only other claim of misleading or false statements had to do with the statement that CF&I did not have long-term financing in place. That statement was one as Judge Magill referred to before was made to the IRS and not the PBGC, in any event, and the testimony is uncontradicted that CF&I had at the time of the spinoff a five-year, $18 million revolving credit agreement with First Interstate Bank of Denver, which was replaced by a five year, $30 million letter of credit with Wells Fargo Bank and that the CFO of CF&I and the CEO of Crane and the CEO of CF&I all describe those as long-term credit arrangements. So that the factual point which I would make to Your Honors is that the only claim, the only claim, of fraud or falsehood **[32]** in this case is now the fact that Crane did not disclose the alleged opinion held by its officers that CF&I would not long survive.

Now, we have also provided evidence to Your Honors that in fact the Crane officers held no such opinion; that at the time of the spinoff there was a lot of factual information available which would indicate their belief that CF&I would, in fact, survive. The 1985 annual report of CF&I indicates that the cash flow and

working capital positions of the corporation improved in 1983 and 1984 and there is in the record, Your Honors, the 1985 operating plan of CF&I and I urge Your Honors attention to that should this become a material issue because that plan they did in October of 1984 projected increasing sales and profits for CF&I during each of the years from 1984 to 1988 and showed at the end of 1988 CF&I's projection that they would have $72 million at the end of the year in cash and securities and that after payment of all obligations to the PBGC so that the documentary record and the testimony of the Crane officials when they were interrogated was, no, we thought this business was going to do fine when we spun it off but I accept, for purposes of this appeal, that **[33]** that could be and I think is the only possible triable issue of fact and I say to Your Honors if the only triable issue of fact is the non-disclosure of that opinion you don't have a fraud here of any sort.

In any event, in terms of the time available and the subjects to be covered, lacking any particular emphasis from the Court, I would next turn to the lower court's holding that Crane had no — I'm sorry?

THE COURT: One question.

MR. DODYK: Yes, Your Honor.

THE COURT: It's argued by (inaudible) that the 1343-A of ERISA is applicable with respect to reportable events and as I understand in order to tie in the defendant there is going to have to be some type of a sham transaction or I guess we would call it — what else have we got here? A sham transaction or an alter ego theory to bring Crane in with CF because that ERISA provision really only applies to the employer making contributions, is it not?

MR. DODYK: Yes, that's correct. The reporting obligation was squarely on CF&I because 1343-A, as Your Honor noted,

applies only to an [34] employer making contributions under a plan and it is very clear and uncontested in this case that CF&I made contributions to the CF&I plan. Crane never made contributions to the CF&I plan and was not obligated to do so. I point out to Your Honor the 1343-A, that part of it, refers to the employer's obligation to tell the plan administrator what to do. The reporting obligation to the PBGC under 1343 rested in the plan administrator, which was at all times in this case either Mr. Hagestrom, a CF&I employee, or CF&I itself.

Now, I think the Court below properly held that that disclosure obligation did not read on Crane because Crane was not an employer making contributions under the plan. Now, in their brief the plaintiffs accused Crane of engaging in a slight of hand reference to the so-called ordinary definition of employer rabid in the PBGC definition and used the concept of single employer as the proper definition under ERISA.

I want to make very clear that the definition of employer, which Crane used, was the definition promulgated by the PBGC, which appeared at 29CFR 2615.2 and that definition says a trade — [35] that an employer is a trade or business maintaining a plan and all trades or businesses under common control with such trade or business. A trade or business maintaining a plan and all trades or businesses under common control with such trade or business. It was a bifurcated definition. It referred both to the trade or business maintaining the plan and to all trades or businesses under a common control and if you take a look at ERISA the word employer is used in both senses.

It's used as meaning the single trade or business and it's used also to mean all trades or businesses under common control and I would point Your Honors to 4062 D 2 of ERISA, which states that if an employer ceases to exist by reason of a liquidation into a parent corporation the parent corporation shall be treated as the employer. One more time, if I may; if an employer ceases to exist

by reason of a liquidation into a parent corporation the parent corporation shall be treated as the employer.

That provision clearly uses the word employer, not to refer to all trades or business under common control but to a particular trade or business and its parent, so that if you construe **[36]** trade or business in all circumstances to refer only to all trades or business under common control that section would make no sense at all because that definition is incapable of using the word employer to refer to the incorporated trade or business and then separately to its parent, so that the regulations and the statute make it clear that the PBGC used the term employer sometimes to refer to a particular trade or business and that's what led Judge Hamilton together with the phrase trade or business making contributions under a plan to conclude that the reporting requirements under 1343 had to apply to CF&I and not to Crane.

Now, I should say that to add to all the complexities in this case the worthies in Washington decided to renumber the provisions in the CF&R so when I refer to 2615.2 has been now renumbered in the CFR to refer to 4001.2.

I do have a sheet of paper in order not to drive your clerk crazy which shows what the correlative provisions are and with the Court's permission I would, of course, showing it to Plaintiff's counsel, tender it to the court so that you can see what the numbering scheme is currently but so I think it's clear that Judge Hamilton was **[37]** correct in concluding that the obligation to report Mr. Hagestrom, the plan administrator —

SIDE TWO:

MR. DODYK: Crane, but even if that weren't the case I think the whole question is a red herring. The question is a red herring because Crane didn't have to notify Mr. Hagestrom that the spinoff had taken place. That was notorious in public event and bear in mind that Mr. Hagestrom —

THE COURT: (Inaudible).

MR. DODYK: Yes, you did. You did some of the other parts of descent have gone by the board, given the nature of the migration and the allegations, Your Honor, which I'm pleased to note at this point but the point is that CF&I wasn't hiding the spinoff from Mr. Hagestrom. Mr. Hagestrom reported it, he reported it to the PBGC. He filed an NRE, a notice of reportable event, in June of that year and he filed it under a provision called 2615.23 describing as the transaction involving a transfer of ownership in CF&I, which it plainly did. It plainly did. It was reported under 2615.23. Now comes the plaintiff and says, aha, but Mr. Hagestrom didn't report the transaction under 2615.22 as a **[38]** transaction to implement a liquidation.

Now, even supposing that Mr. Hagestrom made a mistake and reported it under one provision rather than the other provision, both provisions called for the same information to be supplied to the PBGC and that information was supplied, including the 1984 annual report of CF&I, which showed what trouble it had had in recent time so that the question whether Mr. Hagestrom should have submitted that report under 2615.22 of 2615.23 is immaterial. It is not the ground for an assertion that Crane committed a fraud.

It is not because there is no evidence before the court that anybody would regard the additional filing of another NRE describing the spinoff as material and because there's absolutely no reason to think that Mr. Hagestrom's decision to file that NRE under 2615.23 was motivated by fraud which is then going to be attributed back to Crane. Indeed, he was right. He was right.

He filed it under the proper provision and that is made clear by the fact that Mr. Dellinger in his deposition testified that the spinoff was not a liquidation and therefore need not have been reported under 2615.22 as a transaction to **[39]** implement a liquidation.

What is more in the regulatory release by the PBGC describing these regulations, they include in their description of 2615.23 in defining a transfer of an ownership interest, the transfer of an ownership interest includes a stock dividend and the spinoff of CF&I was a dividend of stock by Crane of the CF&I's stock to its stockholders. Therefore, in the regulatory reference there is 45 CFR 55636 at 643.

The PBGC itself says a stock dividend is a 2615.23 transaction. So what you ultimately have here when you think about it and they're complaining about Crane not making a disclosure to Mr. Hagestrom? First of all, Mr. Hagestrom did file the NRE, there was no non-disclosure, he filed it under 2615.23 as a transfer involving an ownership interest, which is what the PBGC said in its regulatory release that he should have done and even if he had made a mistake who is to say that that's a fraud? Underlying all of this is, of course, another allegation and that allegation is that, well, Crane should have disclosed to the PBGC the alleged opinion of certain of its officers that Crane would not — that CF&I could not long survive **[40]** that spinoff.

Well, passing the question of whether its officers held that opinion, there is nothing in any ERISA reg which requires the disclosure of that opinion or any opinion of a future economic fact and bear in mind that what we're talking about here are PBGC disclosure regulations which are extremely well defined and reticulated and they nowhere say or suggest that an opinion as to a future state of facts should be disclosed.

I should think that the judiciary would be rather slow to construe such a requirement into federal regulations against the background of federal common fraud law, which says it's not a fraud not to disclose what your opinion of the future is, which is, our course, a generally recognizable principle of federal and state fraud law as to which we have, of course, cited the cases.

THE COURT: I see your time is up, Mr. Dodyk, anything further?

MR. DODYK: Much further but what I can say? My time is up.

THE COURT: Back to reportable events.

MR. DODYK: Yes, Your Honor.

[41]

THE COURT: As I understand it, Plaintiffs got the burden of proving a fraud conspiracy or an alter ego theory or a sham transaction and if they prove neither of these, one of the three, their case pretty well falls apart on reportable activity.

MR. DODYK: I would say that slightly differently, Your Honor, if I may. Their case falls apart if they can't prove alter ego or conspiracy on the question of reportable event. With all deference, Your Honor, the sham transaction theory has no application to the disclosure part of the case. The sham transaction doctrine was adopted by the court in White Consolidated as a method of imposing liability under ERISA, not the False Claims Act, on a company which had at an earlier time been part of the same controlled corporate group as a company that was sponsoring a pension plan and prior to the enactment of 4069 in 1986 the law, as it then sat, said that if you weren't a member of the same control group at the time of termination then you couldn't be held liable for any consideration of the pension plan and White Consolidated uses the notion of sham transaction in order to enable the **[42]** PBGC to assert a liability against the predecessor corporation. That has absolutely no relevance to a False Claim Act proceeding, which is necessarily based on some false statement relating to that and as Judge Hamilton said, since you're talking about cases that were decided long after this transaction and the disclosures took place you can't use the sham transaction theory as later conceptualized by a District Court to

impose a retroactive disclosure duty on Crane of any kind so that I think would say, Your Honor, that alter ego and conspiracy the reportable event goes out but bear in mind that the alter ego and conspiracy theories are just one step toward one of six alternatives grounds for possible affirmance, five of which can be used by the Court without any reference to the conspiracy or alter ego argument that we were having here his afternoon.

THE COURT: Speaking of the worthies in Washington, and I should have asked Mr. King this question, will the Supreme Court decision in Hughs Aircraft, ex rel., v. U.S. Schumer have any implications or impact on this case?

MR. DODYK: I think it's very difficult to say at this point, Your Honor, and certainly it **[43]** would have no impact on many of the six alternative grounds of affirmative, which I suggested this afternoon. Thank you for your attention.

THE COURT: Thank you. I believe Mr. King has rebuttal time.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE COURT: Very well.

MR. KING: Starting to decide where to begin. Mr. Dodyk has argued that all of our allegations except that some allegation that Crane officers held an opinion that they should have disclosed to the PBGC, that's what the case now boils down to. It doesn't even boil down to that, to be quite honest. That's a factual dispute. Our evidence in this case is not that Crane officers held some nebulous opinion about what was going to happen to CF&I. If I may remind the Court in 1981 CF&I was making money hand over fist as it had been for years. It had the most profitable year in its history. In 1982 it had hit the skids like very other steel company in this country. It lost $23.5 million that year. Crane had to step in, give it $50 million loan just to keep it afloat in 1982, three years before the spinoff.

It lost 94 million in 1983, 28 million in [44] 1984. In 1985 it only posted a loss of 3.4 million and then it jumped right back up to 20.9 million the year after the spinoff. (Inaudible) knew that CF&I was not going to survive this spinoff.

In addition, what did they do to that company? In 1982, CF&I — Crane slash CF&I's minimum contributions to its pension plans to increase its cash flow it had contributed in 1980 $38 million to the pension plan, some 22, I believe, is the number in 1981. 1982, when Crane makes the decision not to make any contributions to plan the, CF&I makes about a 5 million. $4 million contribution and then until 1989 it doesn't pay a dime.

It doesn't make any minimum considerations and that is why Crane was able to make sure that CF&I survived for five years after the spinoff.

In addition to that what CF&I did to keep itself afloat during those years was a one-time sale of peripheral assets. Peripheral assets were $110 million. It renegotiated labor contracts. It gave stock bonuses in lieu of cash compensation to its employees and it didn't make those cash contributions to the pension plan. That is how CF&I survived until 1990. In no small measure — [45] that was no small thanks to Crane. It was a direct result f what Crane dictated to CF&I when it was under its control. As far as the employee count, that is a factual dispute, Your Honors.

Our evidence in this case, and I'm not sure this is even discussed fully in the briefs because of the limitation of pages, but what in fact happened in this case is that under its own internal rules of counting who is laid off in disregard of the ERISA regulations and how to fill out their annual reports they included, Crane included, about 2,500 employees that should not have been included under erisa [sic] regulations. They say its uncontradicted. It is contradicted. That was their definition. They may have included them for some reason they think is good but our understanding and our testimony and evidence in this

case is that those people should not have been included and we don't think that it was just some simple mistake and we think that when you take it within the entire scheme, what all the evidence is in this case, what was happening here was Crane was desperate to get rid of this company. CF&I, until 1981, was the goose that laid the golden egg but in 1982 it became the albatross about Crane's neck and **[46]** Crane couldn't get rid of it fast enough.

In 1983 it tried to sell the company, couldn't find a buyer, 1984 continued to try to sell to buyer, company couldn't find a buyer and they told Mr. Rabushka — Mr. Evans told Mr. Rabushka, price is not much of an object, if we could just find somebody with sufficient assets to cover the unfunded pension liabilities. That's what this case is all about. It is an old fashioned insurance fraud case.

THE COURT: Mr. King, Mr. Dodyk said, if I understood him correctly, that Mr. Evans and the people from Crane had either this opinion as to what was going to happen in the future to renew it had had gone to the Pension Guarantee Board and said we know that CF&I's going to go broke, that it wouldn't have made any difference, that they wouldn't have cancelled the (inaudible) short of your proof that that would happen or short of the fact that you dispute that they said that his wouldn't have happened that (inaudible) lawsuit —

MR. KING: Correct. I have two responses to that, Your Honor. First of all, I think what the law ought to be is what the government agency should have done under the law if it's presented **[47]** with the case. We have more than that. First of all, we have Mr. Dellinger's own testimony in this deposition. Mr. Dellinger said if he had been told that there had been a complete liquidation of CF&I, his words — frankly, I would have like to have had him say more but he said we would have looked at the case differently.

All we then have to do is look at what PBGC did in 1992. Was the — were the — was the CF&I plan unable to pay benefits that were due at that time: Yes. Did the PBGC terminate the plan at that time? Yes. That's despite Mr. Dellinger's testimony that they would have only terminated the plan if it couldn't pay benefits that were currently due, but in 1992 there was still money in that plan. The benefits were not yet being paid and the PBGC terminated the plan.

THE COURT: To whom was PBGC subrogated to?

MR. KING: To whom was PBGC subrogated? That's language that has been introduced by Crane in this case, Your Honor, the subrogation issue, but really we're not talking about subrogation, what you have here — what happens here? PBGC wears two hats.

THE COURT: What is that you said **[48]** (inaudible) subrogation or is there a statute —

MR. KING: I don't know exactly what you're referring to, Your Honor, but I think the point that gets through to what Crane is trying to raise with this issue is this: PBGC wears two hats, wears the hats of an insurer, wears the mat of a trustee. They're two completely separate roles. As insurer it takes in premiums and it has an insurance fund to which — from which it pays to pay out benefits when a plan goes under and cannot pay the benefits that are due.

That's government money. That's appropriated money. That's the biscuit case, that's in our discussion of whether or not the PBGC is the government. Then you have the PBGC as administer, as trustee administering terminated plans, administering the plan assets, that's not PBGC money. That's money that employers have paid into those pension plans and it administers those funds.

Now, what should have happened in this case is Mr. Dodyk's correct; the PBGC could not have stopped the spinoff but it could have terminated the plan if it had known everything that CF&I and Crane knew about CF&I's condition at that time and **[49]** it makes a lot of sense that it would have done it because then there was somebody to pay those pension plans, would have been a huge gamble. If the PBGC had known everything in 1985 and said, well, we're washing our hands of this, we'll see if CF&I makes it, would have been crazy.

THE COURT: They would have done what at that point had they terminated?

MR. KING: If they had known everything?

THE COURT: Yes.

MR. KING: Our theory of the case is that they would have terminated the plan. Now, we don't have an opinion, that's true, we don't have an opinion of somebody who says, yes, in 1985 that PBGC would have terminated the plan, but we do have other evidence, that 's what I've been talking about, in terms of what Mr. Dellinger said in his deposition and what the PBGC actually did from —

THE COURT: The mechanics of following a termination, what would have happened?

MR. KING: The mechanics of a termination? At that point in time PBGC could have held Crane liable for its share of the unfunded pension liabilities under ERISA and there is no dispute in this case that Crane Company was liable. It was **[50]** part of the control group of CF&I and that it would have been, had there been a termination before the spinoff, there's no question that it had liability under ERISA.

THE COURT: Now, Mr. King, if we sent this back for trial it would be your burden to establish that had they — had the

Pension Benefit guarantee Board have been privy to this information that they would have cancelled and hooked Crane?

MR. KING: That's correct.

THE COURT: And that's what you want to try to do?

MR. KING: Well, with this one caveat. I would say to you, Judge, that is I think what a jury would infer from in evidence in this case. It's what the PBGC did in 1992 after all but I think that when it comes to federal agencies, and we're talking about the public fisc, that there ought to be a slightly different standard.

What should the government, in fact, done if it discharged its responsibilities under the law? If you have a renegade employee and I don't know if Mr. Dellinger is or not but if you have a renegade employee who's part and parcel to the problem, doesn't seem to me the public fisc, **[51]** treasury, the government ought to suffer from that fraud.

It's our position that if the government should have terminated the plan that ought to be good enough but I recognize that may not be the position of the Court. That may not ultimately be what you decide the law to be. And if it's not there is evidence in this case from which a jury could have inferred, should have inferred, I think would have inferred that the PBGC would have terminated the plan in 1985 if it had known all the facts.

THE COURT: I think your time is up. The case is well briefed, well argued, it's now submitted and we will give it our best efforts.

UNIDENTIFIED SPEAKER: Hopefully for the last time.

THE COURT: Yes, hopefully although maybe not. We'll be in recess until 8:30 tomorrow morning.

(End of tape.)

[52]

STATE OF MISSOURI

SS.

CITY OF ST. LOUIS

I, REBECCA BREWER, a Notary Public in and for the State of Missouri, duly commissioned, qualified and authorized to administer oaths and to certify to depositions, do hereby certify that pursuant to agreement I transcribed the preceding conversations on tape on the 16th day of August, 1997, said testimony being by me reported in shorthand and caused to be transcribed into typewriting, and that the foregoing pages correctly set forth the testimony of the aforementioned tape and is in all respects a full, true, correct and complete transcript of the conversations.

I further certify that I am not of counsel or attorney for either of the parties to said suit, not related to nor interested in any of the parties or their attorneys.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this 18th of August, 1997.

My commission expires April 7, 2001.

/s/ Rebecca Brewer
Notary Public

(STAMP)

APPENDIX E

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April 2, 1997

HAND-DELIVERED

Mr. Michael E. Gans, Clerk of the Court
U.S. Court of Appeals for the Eighth Circuit
511 U.S. Court & Custom House
1114 Market Street
St. Louis, MO 63101

Re: *U.S. ex rel. Rabushka, et al. vs. Crane Co.*, No. 96-3017
(Judges Wollman, Beam and Magill)

Dear Mr. Gans:

This letter and the attached cases are submitted on behalf of relator Rabushka, pursuant to Federal Rule of Appellate Procedure 28(j), in order to call the Court's attention to case authority which is pertinent to an issue that came up during oral argument in St. Paul on March 13, 1997.

During oral argument, the issue was raised whether at trial Relator would have to prove what the Government *would* have done but for Crane's fraudulent concealment or whether proof of what the Government *should* have done would be sufficient. This issue was briefed in the district court, at page 5-7 of Relator's Surreply Memorandum in Opposition to Defendant's Motion for Summary Judgment filed April 15, 1996 (a copy of

which is attached hereto for the Court's convenience). Just so there is no confusion on this point, Relator refers the Court to the discussion on pages 31-33 of his Amended Reply Brief as additional reasons why the district court's entry of summary judgment was erroneous, regardless of which of the two standards apply.

As the Court will recall, this issue arose during a discussion of Royal Dellinger, the former PBGC employee who was deposed and who, after the close of discovery, signed an affidavit at Crane's request. It is Relator's position that Mr. Dellinger's speculation in his affidavit that the PBGC would not have terminated the CF&I Plan and held Crane liable "regardless of any 'fraudulent concealment of the facts'" establishes either that Dellinger would have acted negligently, or that Dellinger would have acted outside the scope of his authority.

The authorities which Relator cited to the district court establish the principle that the Government is not precluded from recovering damages caused by a fraud perpetrated on it where government agents or employees acted negligently or outside the scope of their authority. Those cases are: *DeVilbiss v. SBA*, 661 F.2d 716, 718 (8th Cir. 1981) ("The principle is well settled that the United States is not bound by the unauthorized acts or representations of its agents"); *United States v. Kates*, 419 F.Supp. 846, 854 (E.D. Pa. 1976) ("the False Claims Act provides a remedy in the nature of common law fraud, which is an intentional tort, and contributory negligence would be *no defense*") (citations omitted, emphasis added); "[c]itation of authority is not necessary to support the proposition that the Government is not bound by acts of its officers which are not within the scope of the conferred authorities."); *United States v. U.S. Cartridge Co.*, 78 F.Supp. 81, 85 (E.D. Mo. 1948) (False Claims Act case) ("Citation of authority is not necessary to support the proposition that the Government is not bound by acts of its officers which are not within the scope of the conferred

authorities."); *United States v. Fox Lake State Bank*, 225 F. Supp. 723, 724 (N.D. Ill. 1963) (False Claims Act case) ("the public in general should not so suffer for the act of a single government agent"); *United States v. One Distillery and Fixtures*, 193 F. 720, 724 (D.N.C. 1911) (False Claims Act case) ("The government does not lose its rights by reason of the failure of its officers to discharge their duty, or because of their dereliction or malfeasance"). *See also U.S. v. St. Paul, Minneapolis, & Manitoba Ry. Co.*, 247 U.S. 310, 314 (1917) (citing a "general principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers").

Please forward these citations to Judges Wollman, Beam and Magill. Thank you for you attention to this matter.

Yours truly,

/s/ Robert L. King
Robert L. King

enclosure
pc: Paul M. Dodyk
David W. Harlan
Michael Taxay

APPENDIX F

Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

April 9, 1996

Timothy J. Coleman, Esquire
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Rex Carr, Esquire
Carr, Korein, Tillery, Kunin,
Montroy, Glass & Bogard
41 Missouri Avenue
East St. Louis, IL 62201

Re: ***U.S. ex rel Rabushka v. Crane Co.***

Dear Sirs:

I write to clarify facts regarding the Affidavit of Royal S. Dellinger in the above-captioned case, sworn to on March 14, 1996. The Pension Benefit Guaranty Corporation's (PBGC) Office of the General Counsel received a copy of the affidavit on March 15, 1996.

PBGC designated Mr. Dellinger under Rule 30(b)(6) of the Federal Rules of Civil Procedure to provide testimony at a deposition noticed by defendant Crane Co. for December 18, 1995 in the above-captioned case. On that date, counsel for Crane Co. deposed Mr. Dellinger, who was represented by attorneys in the PBGC's Office of the General Counsel.

Although PBGC designated Mr. Dellinger as a Rule 30(b)(6) witness for the December 18, 1995 deposition, and provided him with legal representation at that time, neither I, nor any one else

in the Office of the General Counsel, was informed by counsel for Crane Co. that they were requesting additional testimony from Mr. Dellinger by way of affidavit. Counsel for Crane Co. apparently contacted Mr. Dellinger directly to provide the affidavit; counsel for PBGC was not informed by either counsel for Crane Co. or by Mr. Dellinger of this communication.

PBGC has adopted regulations setting forth the rules and procedures to be followed when a former PBGC employee is requested to appear as a witness in a proceeding to which PBGC is not a party. *See* 29 C.F.R. §§ 2602.41 through 2602.44. The regulations define "Appearance" to include testimony by affidavit. *Id.* § 2602.42. No former employee may provide an affidavit in a proceeding unless authorized by these PBGC regulations. *Id.* § 2602.43.

The regulations require that the General Counsel for PBGC be notified promptly of a request for an appearance governed by the regulations. The General Counsel then considers several factors, and can authorize the appearance if, and to the extent, the appearance is in the interest of PBGC. *Id* § 2602.44.

With regard to the Dellinger affidavit, I was not informed that such an affidavit was being sought. PBGC did not authorize the Dellinger affidavit, did not participate in the preparation of the affidavit, did not designate Mr. Dellinger as a 30(b)(6) witness for purposes of such an affidavit, and indeed was unaware of the affidavit's existence until after it was completed and served on the Plaintiff in this proceeding.

Sincerely,

/s/ James J. Keightley
James J. Keightley
General Counsel

cc: The Honorable Jean C. Hamilton
Chief Judge
U.S. District Court for the Eastern District of Missouri
Michael F. Hertz, Esquire
Royal S. Dellinger

APPENDIX G

STATUTE INVOLVED

31 U.S.C. § 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an

obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

FILED
FEB 17 1998
CLERK

No. 97-998

IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES ex rel. STANLEY RABUSHKA
AND STANLEY RABUSHKA,

Petitioner,

v.

CRANE CO.,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Crane Co.

VICTOR F. CALDWELL
Of Counsel

February 17, 1998

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether summary judgment dismissing plaintiff's action under the False Claims Act was properly granted upon defendant's uncontradicted proof that the Pension Benefit Guarantee Corporation's actions were not affected by the nondisclosure complained of by the plaintiff?

Whether plaintiff's claim that the Pension Benefit Guarantee Corporation should have followed policies different from those actually implemented presents an issue triable by a jury under the False Claims Act?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that respondent Crane Co. has no corporate parents, subsidiaries or affiliates that have issued shares to the public.

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No. 97-998

IN THE

Supreme Court of the United States

October Term, 1997

UNITED STATES ex rel. STANLEY RABUSHKA
AND STANLEY RABUSHKA,

Petitioner,

v.

CRANE CO.,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for a writ of *certiorari* seeking review of the opinion of the Court of Appeals for the Eighth Circuit reported at 122 F.3d 559.

COUNTERSTATEMENT OF THE CASE

The petition is based on an asserted conflict between the Eighth Circuit opinion below and this Court's opinion in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972) which does not exist. The Circuit Court opinion below affirmed a grant of summary judgment based on respondent Crane's uncontradicted showing that the actions of the Pension

Benefit Guarantee Corporation ("PBGC") were not in any way affected by the nondisclosure complained of. (at A11)[1] As shown at p. 9 below, every Circuit Court which has considered the issue has decided that the presumption of reliance articulated by this Court in *Affiliated Ute* may be rebutted upon an appropriate showing by defendant. Respondent Crane made such a showing and the Eighth Circuit properly affirmed the grant of summary judgment.

Petitioner proceeds to argue that the Circuit Court erred in failing to consider his argument that the PBGC should have followed policies relating to the termination of pension plans different from those actually implemented by the PBGC. Petitioner's argument that the PBGC should have followed different policies does not raise a question which may be determined by a jury in the guise of a claim asserted under the False Claims Act. Petitioner's quarrel with the PBGC does not constitute circumstantial evidence of the PBGC's reliance.

Facts and Proceedings Below

Crane is a diversified company engaged in the manufacture of engineered products for industry, aerospace and defense. At an earlier time, Crane also held interests in certain heavy industrial manufacturers, including Colorado Fuel & Iron (CF&I), of which Crane became the majority stockholder in 1969. (at A18) During the 1980s Crane reoriented its business by divesting itself of its interests in heavy industry. As part of this program, Crane spun off its shareholding in CF&I in May 1985.

Petitioner's False Claims Act action is premised on the claim that the PBGC would have terminated a pension plan maintained by CF&I (the "Plan") and asserted claims against Crane at the time of the spinoff in May 1985 if a certain disclosure had been made.

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[1] Citations are to petitioner's Appendix.

CF&I established the Plan in 1950, long before Crane acquired its stockholding in 1969. (at A18) The Plan was insured under the Employee Retirement Income Security Act, 29 U.S.C. § 1301 *et seq.* ("ERISA"). (at A18) CF&I financed and administered the Plan at all times. (at A18) ERISA and the PBGC regulations impose certain reporting requirements on the Plan Administrator, including an obligation to file Notices of Reportable Events or "NREs" on certain occasions. 29 U.S.C. § 1343, 29 C.F.R. § 2615. (at A18) From 1977 to 1986, the Plan Administrator was Mr. Lawrence Hegstrom, a CF&I employee; thereafter CF&I was the Plan Administrator. (at A18) Crane was at no time either the Plan Administrator or a contributor of funds to the Plan. (at A18)

CF&I funded its pension plan aggressively during the late 1970s so that no additional funding was required in the early 1980s. At the date of the CF&I spinoff in May 1985, the Plan had assets of $45,000,000 and was making pension payments of about $5,000,000 a year. (at A12)

CF&I enjoyed the best year of its 100-year history as the largest steelmaker west of the Mississippi in 1981, with sales of $723 million and income of $39 million. CF&I suffered an abrupt reversal of fortune in 1982 as the oil well tubing market on which it depended collapsed. (at A20) CF&I's business rebounded in 1984 and 1985 so that its cash flow became positive at $29 million in 1984 and $12.5 million in 1985. CF&I's improved performance resulted in net working capital of $34 million in the month of the spinoff, May 1985—an amount which exceeded its working capital at the height of its success in the Fall of 1981. CF&I's business plan adopted in late 1984 for the period from 1984 to 1988 showed increasing sales and earnings and culminated in forecasted operating profits of $69 million and a year-end cash balance of over $70 million in 1988, after payment of all of CF&I's pension obligations.

That was the financial picture when CF&I was spun off in May 1985: positive cash flow, record working capital levels, increasing projected earnings, and a pension plan with $45,000,000 in assets as against about $5,000,000 in annual payments.[2]

Mr. Hegstrom, the CF&I Plan Administrator, timely filed the Notice of Reportable Event ("NRE") required as a result of this spinoff with the PBGC, notifying the agency under 29 C.F.R. § 2615.23 that the spinoff was "a transaction involving a transfer . . . of ownership interest in a contributing sponsor" and sending all of the information required, including the most recent financial statements of CF&I and the Plan. (at A4)

The thrust of petitioner's complaint is that Mr. Hegstrom should also have filed an NRE under 29 C.F.R. § 2615.22 describing the spinoff as a transaction to implement a liquidation. The premise of petitioner's claim is that Crane officers "knew" in May 1985 that CF&I would enter bankruptcy some five years later (CF&I entered bankruptcy in November 1990) and that Crane was required to notify Mr. Hegstrom of their opinion. Petitioner claims that if Mr. Hegstrom had filed the additional NRE in May of 1985, the PBGC would have terminated the CF&I Plan and asserted claims against Crane as CF&I's parent corporation. (Petition, at 12)

The Circuit Court affirmed the grant of summary judgment against petitioner on the grounds that Crane had conclusively proven that the PBGC's decision not to terminate the CF&I Plan in May 1985 was in no way affected by the

---

[2] Petitioner's argument by sound bite, using phrases such as "bankrupt company" and "contrary to everything 'moral, ethical, sound business practice, common sense and the American way'" is a shameless distortion of the record. The quoted phrases do not refer to CF&I's financial condition at the time of the spinoff, as petitioner well knows.

nonfiling of the additional NRE which petitioner claims should have been filed.

The Circuit Court concluded:

> "Crane's evidence—the PBGC's policy against involuntarily terminating a plan when it had sufficient assets to pay current benefits, the CF&I plan's ability to pay benefits as they came due in 1985, the fact that the spin-off did not warrant an involuntary termination in 1985, the PBGC's subsequent refusal to terminate the plan in 1987, and the fact that the plan would not have been terminated in 1985 even if the PBGC determined that CF&I's liquidation or inability to make benefit payments was inevitable so long as those events did not occur for more than one year—overwhelmingly establishes that the PBGC would not have terminated CF&I's plan in 1985." (at A11)

Crane's proof that the PBGC's decision not to terminate the CF&I Plan in May 1985 was unaffected by the nondisclosure complained of by petitioner was only one of two grounds upon which Crane's motion for summary judgment was granted by the courts below. The Hon. Jean C. Hamilton, Chief Judge of the District Court for the Eastern District of Missouri, granted Crane's motion for summary judgment on the grounds that Crane made no statements of any kind to the PBGC and was not, under the applicable PBGC regulations, obligated to make any statements to the PBGC, directly or indirectly. The party responsible for filing an NRE with the PBGC was not Crane, but the Plan Administrator, who was Mr. Hegstrom, a CF&I employee in May 1985, and CF&I itself at later times. ERISA imposes a secondary duty of disclosure on certain entities if they have knowledge of events reportable in an NRE. That secondary duty was, however, imposed only on "employers making contributions". 29 U.S.C. § 1343(a). Since it was undisputed that Crane had never made

contributions to the Plan, the District Court properly concluded that Crane had no disclosure obligations to the PBGC. In the District Court's words:

> "Plaintiffs have failed to demonstrate a material factual dispute as to whether Crane was involved in or legally responsible for any false record or statement to the PBGC. The Court concludes that Crane in fact had no obligation . . . to make any disclosures to the PBGC." (at A49)

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE EIGHTH CIRCUIT'S DECISION AFFIRMING THE GRANT OF SUMMARY JUDGMENT WAS CORRECT AND DID NOT CONFLICT WITH THIS COURT'S DECISION IN *AFFILIATED UTE.*

The Eighth Circuit's decision affirming the grant of summary judgment to respondent Crane was correctly decided and involves no issue worthy of *certiorari*. As the Circuit Court framed the problem:

> "If Rabushka cannot show that the PBGC would have terminated CF&I's pension plan in 1985 had it known that the spinoff was a transaction to implement CF&I's liquidation, then there is no false claim because the PBGC's payment of CF&I's unfunded pension liabilities would have occurred regardless of Crane's actions." (at A8)

The Court went on to hold that: "Crane's evidence . . . overwhelmingly establishes that the PBGC would not have terminated the CF&I Plan in 1985" regardless of any disclosure or nondisclosure by Crane. (at A11)

In reaching this decision, the Circuit Court relied on the following evidence. (at A9-12) The PBGC tendered Mr. Royal Dellinger as their 30(b)(6) witness relating to the PBGC's decision not to terminate the plan in May 1985. Mr. Dellinger was the PBGC's deputy executive and chief negotiating officer during the 1980s. He testified that during the relevant time period, the PBGC's policy was not to terminate pension plans unless they were unable to pay benefits when due or were abandoned by the employer. (at A9) He testified that the PBGC would not terminate a plan on the grounds that the plan would not be able to pay benefits at some subsequent period unless it was unable to make those payments in the immediate future, which meant within the ensuing twelve months. (at A9-11)

Mr. Dellinger testified that the CF&I spinoff did not warrant termination of the Plan. (at A9-10) Mr. Dellinger testified that the PBGC would not have terminated the CF&I Plan, whether or not it was deemed a transaction to implement a liquidation, if the spinoff would not have led to the cessation of payments to its pension beneficiaries within a year. (at A10)

The Circuit Court also relied on the fact that CF&I approached the PBGC in 1987 in an effort to persuade the PBGC to terminate its pension plan and was turned down. (at A10) During those meetings, Mr. Crocker Nevin, Chairman of CF&I, reported "the details of CF&I's current and future financial condition to the PBGC, including the fact that its pension plan was underfunded by $120 million". (at A10)

Petitioner offered no evidence to rebut Crane's showing in support of its motion. Petitioner produced no witness who contradicted the PBGC's description of its own policies. In his petition, petitioner argues that Mr. Dellinger testified that the PBGC "would have reviewed the case differently" if CF&I had stated that the spinoff constituted a liquidation of the company. (Petition, at 5) However, Mr. Dellinger also testified that he did not "believe that it [the PBGC] would have

taken action based on that assertion", and that he meant only that "the agency would have initiated an effort to find out if in fact a liquidation was going to occur". (at A11) None of that testimony comes close to any conflict with Mr. Dellinger's basic and often-repeated statement that the PBGC would not have terminated the CF&I Plan unless it became apparent that the Plan would be unable to make pension payments within the year. (at A9-A11)

Petitioner also argues that the fact that the PBGC terminated the CF&I Plan in March 1992, some seven years after the May 1985 spinoff, proves that the PBGC would have terminated the CF&I Plan in 1985 if a second NRE had been filed. The Eighth Circuit correctly rejected petitioner's argument: "we do not find persuasive Mr. Rabushka's speculation based solely on the PBGC's 1992 termination of CF&I's plan . . . ." (at A12) In reaching this conclusion, the Eighth Circuit emphasized the difference in the Plan's financial condition in 1985 as compared to 1992. "In 1985, the plan had $45 million in assets to pay $5 to $6 million in benefits per year. In 1992, it had only $35 million in assets to pay $18 million in benefits per year." (at A12) Moreover, in 1985 CF&I had emerged from its 1982 reversal and was generating a positive cash flow and record working capital levels. By 1992, CF&I had been in bankruptcy for over a year and was unable to satisfy its funding obligations to the Plan under ERISA.

Based on this evidence, the Eighth Circuit properly concluded that respondent Crane was entitled to summary judgment because the overwhelming evidence established that the PBGC's decision not to terminate the CF&I Plan in May 1985 was based on the Plan's ability to pay its current pension obligations and was not affected by any disclosure or nondisclosure by Crane.

Petitioner's argument that the Eighth Circuit's opinion conflicted with the Court's opinion in the *Affiliated Ute* case is

based on a misinterpretation of that case. Every Circuit Court which has considered the issue has ruled that the presumption of reliance set forth in *Affiliated Ute* may be rebutted. *Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987); *Rochez Bros., Inc. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1973); *Carras v. Burns*, 516 F.2d 251, 257 (4th Cir. 1975); *Mason v. Marshall*, 531 F.2d 1274, 1274 (5th Cir. 1976); *Chelsea Associates v. Rapanos*, 527 F.2d 1266, 1271-1272 (6th Cir. 1975); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1048 (7th Cir. 1977); *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040, 1048 (8th Cir. 1977); *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975); *Ross v. Bank South, N.A.*, 885 F.2d 723, 738 (11th Cir. 1989).

As the Third Circuit explained in *Rochez Brothers*, 491 F.2d at 410:

> "We do not read [the *Affiliated Ute*] decision to say that the question of reliance *vel non* may not be considered at all in a non-disclosure case, but only that proof of reliance is not required for recovery. If defendant is able to demonstrate that there was clearly no reliance, that is, that even if the material facts had been disclosed, plaintiff's decision as to the transaction would not have been different from what it was, then the non-disclosure cannot be said to have caused the subsequent loss and under the ordinary principles of the law of fraud, recovery should be denied."

In accordance with these authorities, Crane rebutted any presumption of reliance which might arise as a result of the nondisclosure that the spinoff of CF&I was a transaction to implement a liquidation. In the words of the Eighth Circuit, Crane's evidence "overwhelmingly establishes" that the PBGC's decision not to terminate the CF&I Plan in May 1985 was not and could not have been affected in any way by the nondisclosure complained of by Rabushka. (at A11) The

Eighth Circuit's decision is, therefore, both correct and consistent with the Court's decision in *Affiliated Ute*.

Petitioner proceeds to argue that the Eighth Circuit erred in disregarding his argument that the PBGC "should have" terminated the CF&I Plan. Petitioner attacks the PBGC's policies as "irrational" and claims that a St. Louis jury should decide whether the PBGC should have terminated the CF&I Plan, regardless of the policies which the PBGC was in fact following during the 1980s.

The PBGC approached the decision whether to terminate a pension plan with appropriate care. Termination of a pension plan inflicts serious injury on the plan's beneficiaries. Termination interrupts the accrual of pension benefits by the beneficiaries. Termination results in forfeiture of pension benefits by beneficiaries whose pension rights are not yet vested. Termination also imposes liability for the payment of future pensions on the PBGC. These considerations led the PBGC to adopt a policy of refraining from the termination of a plan unless and until it became clear that the plan would be unable to pay benefits in the very near future. There is nothing "irrational" about that policy. The policy represents a reasoned compromise between a number of the PBGC's conflicting objectives.

In any event, petitioner's view of the wisdom of the PBGC's termination policies does not constitute a grounds for granting *certiorari* in this case. Petitioner's disagreement with the PBGC's termination policies does not raise an issue which can be determined by a St. Louis jury in the context of a False Claims Act case. Petitioner's argument that the PBGC should have followed different termination policies does not constitute circumstantial evidence of reliance by the PBGC.

Whether the PBGC's termination policies during the 1980s were within the authority granted by ERISA is a decision which a Federal court could decide in an action brought by a

proper party. In the context of such an action, the question would be a question of law to be decided by the Court, not a question of fact to be decided by a jury. Petitioner's argument is, however, most decidedly not circumstantial evidence of whether the PBGC would have terminated the CF&I Plan if CF&I had filed an NRE describing the spinoff as a transaction to implement a liquidation.

II.

DISMISSAL OF THE ACTION BY THE COURT BELOW WILL NOT BE AFFECTED BY THIS COURT'S REVIEW OF THE ISSUES PRESENTED BY PETITIONER.

"If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, *certiorari* may be denied." Robert L. Stern & Eugene Gressman, *Supreme Court Practice*, 272 (5th ed. 1978) (relying on *Sommerville v. United States*, 376 U.S. 909 (1964), where it was evident that resolution of the conflict would not change the result reached below). The grant of summary judgment below will not be affected by this Court's review of the issues presented by petitioner. The courts below granted Crane's motion for summary judgment on two independent grounds. Chief Judge Jean C. Hamilton of the United States District Court for the Eastern District of Missouri granted summary judgment because petitioner failed to establish that Crane made any disclosure to the PBGC or had any duty to make any disclosure to the PBGC. (at A49) The District Court's decision was correct and involves no issue worthy of *certiorari*.

It was undisputed that Crane made no disclosures to the PBGC in connection with the spinoff of CF&I. (at A47) The pension plan in question was a plan established and maintained by CF&I for its employees. (at A18) The plan was funded and administered by CF&I. Crane never made any contributions to

the CF&I Plan. (at A46) Crane's relationship to CF&I and the Plan consisted of Crane's role as the parent corporation of CF&I from 1969 to May 1985. (at A18)

Under ERISA and the PBGC regulations, reporting requirements relating to pension plans covered by ERISA are imposed on the Plan Administrator. (at A18) Mr. Lawrence Hegstrom, a CF&I employee, was the Plan Administrator for the CF&I Plan from 1977 through 1986. (at A18) Included in Mr. Hegstrom's duties was the duty to file Notices of Reportable Events or NREs with respect to the CF&I Plan. (at A18) Mr. Hegstrom did timely file an NRE under 29 C.F.R. § 2615.23 in connection with the May 1985 spinoff, notifying the PBGC of "a transaction involving a transfer . . . of ownership interest in a contributing sponsor" and supplying all the information required, including the most recent financial statements of CF&I and the Plan.

As the District Court summarized the matter: "The undisputed evidence shows that Mr. Hegstrom, other CF&I employees and CF&I's actuaries and accountants were responsible for all PBGC filings concerning CF&I's Pension Plan and that Crane did not attempt to influence those filings". (at A18)

The District Court then turned to petitioner's argument that Crane had violated its asserted duty to advise the Plan Administrator of its knowledge of a reportable event. The Court correctly identified 29 U.S.C. § 1343(a) as the controlling provision. That section provides: "Whenever an *employer making contributions under a plan* . . . knows or has reason to know that a reportable event has occurred, he shall notify the plan administrator immediately" (emphasis added). (at A45) It was undisputed that Crane had never made any contributions to the CF&I Plan. As a result, "the Court finds that Crane was not an 'employer making contributions' within the meaning of 29 U.S.C. § 1343(a) and that Crane therefore

had no reporting obligations to the CF&I Plan Administrator". (at A46)

The District Court's decision was plainly correct and independently dispositive of petitioner's claim. Petitioner's action is, therefore, properly dismissible whatever view is taken of the issues raised in the petition.

III.

PETITIONER'S ACTION IS DISMISSIBLE ON A VARIETY OF OTHER INDEPENDENT GROUNDS.

Resolution of the issues raised by the Petition for Writ of *Certiorari* would not affect the result in this case in any event. Petitioner's action against Crane is dismissible on a variety of other grounds.

Petitioner's claim of actionable nondisclosure rests on his assertion that someone should have disclosed to the PBGC the alleged opinions of certain Crane officers that CF&I would go bankrupt at some unspecified time after the May 1985 spinoff. For present purposes, Crane passes the question of whether any Crane officer actually held such an opinion, noting only that such an opinion would have been inconsistent with CF&I's improved financial condition in May 1985 and, most importantly, with CF&I's operating plans for 1985 through 1988 which forecast increasing sales and earnings throughout the period. *See* p. 3, *supra*.

For present purposes, it is sufficient to point out that under federal law a prediction of future events cannot constitute the basis for a fraud claim except in certain circumstances not here present. *See, e.g., In re The Bible Speaks*, 869 F.2d 628, 643 (1st Cir. 1989); *James v. Nico Energy Corp.*, 838 F.2d 1365, 1371 (5th Cir. 1988). In rare circumstances, opinions may constitute the basis for a fraudulent misrepresentation where the defendant holds himself out as an expert and does not, in

fact, hold the opinion he expresses. *See, e.g., Harazim v. Lynam*, 267 Cal. App. 2d 127, 132-133 (Cal. Ct. App. 1968).

That doctrine can have no application to this case for the simple reason that no opinion was expressed. In a nondisclosure case, unspoken predictions of future events cannot constitute false statements. Petitioner's claim fails to state a cause of action for that reason alone.

Petitioner's claim is also dismissible because this case involved no actionable false claims. Crane made no claim of any kind upon the Government. The claims made by the CF&I pensioners could not be false claims. There is no allegation that the CF&I pensioners' claims against the PBGC involved any false statements by them. The PBGC was obligated to pay those claims as the insurer of pension plans under ERISA. If anything, petitioner's claim involved a so-called "reverse false claim"; that is, the PBGC may have had a theoretical claim against Crane for reimbursement of its payments to CF&I Plan beneficiaries because, under circumstances not here present, the PBGC may assert claims against the parent corporation of a subsidiary, such as CF&I, whose plan is terminated.

However, there was no liability for reverse false claims prior to the amendment of the False Claims Act as of January 1986. All Circuit Courts to have considered the 1986 amendments have declined to apply them retroactively. *See Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 689 (8th Cir. 1995); *United States v. TDC Management Corp., Inc.*, 24 F.3d 292, 298 (D.C. Cir. 1994); *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992); *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991).

Both the District Court and the Circuit Court, therefore, correctly concluded that petitioner's claim stated no actionable reverse false claim. (at A12, A40) Since petitioner's claim stated neither an actionable false claim nor an actionable reverse false claim it should have been dismissed on that

ground as well. *See United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605 (8th Cir. 1992). The District Court erroneously analogized this case to certain cases in which defendants had obtained funds using innocent third parties as conduits and denied Crane's motion to dismiss on these grounds. (at A34) In doing so, the court overlooked the fact that Crane never received any funds from the Government directly or indirectly.

Crane's only potential involvement with the Government in this matter arose from the fact that Crane might have had an obligation to the PBGC, not a claim against it. The nature of Crane's involvement meant that the only conceivable claim against Crane under the False Claims Act would have been as a reverse false claim. Since reverse false claims were not actionable prior to January 1, 1986, and the spinoff occurred in May 1985, petitioners had no actionable reverse false claim.

Petitioner's claim is also dismissible because ERISA vests the power to enforce reporting requirements in the PBGC and does not confer standing on private parties. *See* 29 U.S.C. §§ 1302, 1309. Petitioner's complaint is an attempt to recast alleged violations of ERISA reporting requirements as false claims under the False Claims Act. Petitioner's false statement allegations, however, are in fact claims of highly technical alleged violations of ERISA and PBGC regulations. Specifically, petitioner claims that an NRE describing the 1985 spinoff as a transaction to implement a liquidation under 29 C.F.R. § 2615.22 should have been filed along with the NRE which Mr. Hegstrom actually did file under 29 C.F.R. § 2615.23, describing the spinoff as "a transaction involving a transfer of . . . an ownership interest in a contributing sponsor."

The Federal courts have held that where Federal legislation enacts a statutory scheme involving a complex regulatory procedure and vests enforcement authority in a government agency, the courts should not construe statutes of general application such as the False Claims Act to vest rights

of action in private individuals. For example, Federal courts have ruled that a private party may not bring RICO actions complaining of alleged violations of the Service Contract Act. *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1226 (D.C. Cir. 1991).

That doctrine is clearly applicable to this case.

ERISA established the PBGC to administer and enforce its provisions. 29 U.S.C. § 1302. Title IV provides that to carry out its purposes, the PBGC is empowered " to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). Moreover, the PBGC is authorized to bring "[c]ivil actions . . . for appropriate relief, legal or equitable or both, to enforce the provisions of [Title IV]". 29 U.S.C. § 1303(e)(1).

Title IV outlines the circumstances in which the PBGC may institute proceedings to terminate a pension plan and sets forth procedures for such termination by the PBGC. 29 U.S.C. § 1342. The decision whether to terminate a plan is within the sole discretion of the PBGC. *See* 29 U.S.C. § 1342(a)(1), (2) & (3). If the PBGC terminates a plan with insufficient assets, ERISA authorizes the PBGC to impose liability on the employer who maintained that plan. *See* 29 U.S.C. § 1362.

Title IV provides a comprehensive remedial scheme. Title IV does not empower any person or entity other than the PBGC to bring an action to terminate a plan under § 1342. Nor does Title IV empower any person or entity other than the PBGC to assert claims against an employer under § 1343 for alleged violations of ERISA's reporting obligations. Prior to 1986, Title 1 of ERISA was the only portion of the statute which provided for private enforcement. 29 U.S.C. § 1132(a). Section 1132(a) allows plan participants, beneficiaries, and fiduciaries, as well as the Secretary of Labor to bring a "civil action . . . for appropriate relief" for violations of the

provisions of that subchapter. *See Varity Corp. v. Howe*, 116 S. Ct. 1065, 1075 (1996). The creation of private cause of action under § 1132(a)(2) makes clear that Congress addressed the issue of private party standing and provided for it where intended. It is equally clear that ERISA does not confer standing on petitioner.

Since petitioner's claim, in fact, alleged nothing more than an asserted technical violation of PBGC reporting regulations, it may not be brought as a False Claims Act action.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be denied.

February 17, 1998

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IN THE
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United States *ex rel.* Stanley Rabushka
and Stanley Rabushka,

Petitioners,

v.

Crane Co.,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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MOTION OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37, Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) sought consent of all parties to file a brief as *amicus curiae* supporting Stanley Rabushka's Petition for a Writ of *Certiorari*. Rabushka consented; Crane Co. withheld consent. Thus, TAF seeks leave to file the accompanying brief.[1]

[1] The following information is furnished to comply with Rule 37.6. Counsel for TAF authored this motion and the accompanying brief. No person or entity other than TAF made a monetary contribution to the

INTEREST OF *AMICUS CURIAE*

TAF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the federal False Claims Act (FCA or Act). TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government, and facilitate the filing of meritorious False Claims Act *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to prosecute *qui tam* suits effectively; (3) inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

TAF is currently based in Washington, D.C. with a staff of nine full-time employees, including six attorneys. TAF works with a network of more than 200 attorneys nationwide who represent *qui tam* plaintiffs in FCA litigation. In the past few years, TAF has greatly expanded its efforts toward public awareness and education regarding the FCA.

TAF publishes the *False Claims Act and Qui Tam Quarterly Review*, a quarterly publication which provides an overview of case decisions, settlements, and other developments under the Act. The publication is distributed free of charge to more than 1400 recipients, including all federal circuit courts of appeal.

TAF collects and disseminates information concerning the False Claims Act and *qui tam*. TAF regularly responds to inquiries from a variety of sources, including the general public, the legal community, the media, and government officials. TAF maintains a comprehensive False Claims Act

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preparation or submission of this motion or the accompanying brief.

library open to the public, and TAF has an educational presence on the Global Internet. TAF also has provided congressional testimony, participated in conference presentations, and assisted with training programs.

Over the last decade, TAF has supported numerous FCA cases throughout the country, including a number of suits that have each returned over fifty million dollars to the United States Treasury. TAF is presently involved in several *qui tam* suits that potentially will return millions of dollars to the U.S. Treasury. The funds TAF recovers from successful cases are continually reinvested to develop and support future *qui tam* actions and to fund TAF's educational activities.

TAF has filed *amicus* briefs on important legal and policy issues in FCA cases before numerous federal courts, including this Court. TAF possesses extensive knowledge about the origin and purposes of the False Claims Act Amendments of 1986 and experience with its implementation. As such, its brief will assist the Court's consideration of Stanley Rabushka's Petition for a Writ of *Certiorari*.

THIS MOTION IS TIMELY SUBMITTED

This brief is timely submitted as the deadline for the filing of a brief in opposition to Rabushka's Petition for a Writ of *Certiorari* is February 17, 1998.

CONCLUSION

For these reasons, TAF respectfully requests that this motion be granted and that the Clerk be directed to file the

brief being submitted herewith.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

SUMMARY OF ARGUMENT

Congress legislated an overhaul of the False Claims Act (FCA or Act) in 1986 to enhance the Federal Government's ability to recover losses sustained as a result of fraud. The breadth of situations in which the Act has potential applicability is as wide as the types of programs for which the Government provides financial support. As the FCA is a legal tool to fight fraud against the Federal Government, and the Government acts through its employees and agents, those

employees and agents may be called upon to play a role in FCA litigation as they were in this case.

Use of a government employee as a witness or information source in FCA litigation, however, must be approached with caution. While the government employee or agent may be in a good position to know the details about the facts underlying an FCA case, he or she may lack objectivity because true candor might reflect poorly on his or her job performance or stewardship of government resources. Consistently more reliable and objective sources of information for FCA litigation are legal and regulatory requirements that agencies must follow.

Taxpayers Against Fraud, The False Claims Act Legal Center (TAF) submits this *amicus* brief to assist the Court's understanding of the significance and wide-ranging implications of Stanley Rabushka's Petition for a Writ of *Certiorari*. Thus, TAF's brief provides background of and context for the False Claims Act, and then discusses why it is of great importance for this Court to determine the most appropriate role for legal and regulatory standards and for government employees and agents to play in FCA litigation.

ARGUMENT

I. The Amended False Claims Act Is the Government's Primary Litigative Tool Against Fraud.

The 1986 FCA Amendments were the legislative response to what Congress concluded was a "severe" problem -- that is, the "growing pervasiveness of fraud" in Federal programs and procurement. S. REP. NO. 345, 99th Cong., 1st Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266

(S. REP.).[1] The purpose of the reform was to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government" by modernizing the "Government's primary litigative tool for combatting fraud." S. REP. at 1, 2, *reprinted in* 1986 U.S.C.C.A.N. 5266.

As an integral part of this modernization, Congress revitalized the False Claims Act's *qui tam* provisions because it believed that "only a coordinated effort of both the government and the citizenry will decrease this wave of defrauding public funds." S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Among other things, its explicit intent was "to encourage more private enforcement suits" under the Act. S. REP. at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89. As the False Claims Act addresses fraud against the Federal Government, it potentially comes into play whenever a false or fraudulent claim for payment or approval is submitted by an entity seeking federal funds. Amending the FCA to enlist the help of the public in this vital endeavor has already had a tremendous impact.

According to the Justice Department, over $1.831 billion has been recovered under the *qui tam* provisions of the amended Act through fiscal year 1997.[2] Over 2,000 *qui tam*

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[1] Congress cited with alarm U.S. Department of Justice (DOJ or Justice Department) estimates that fraud was draining up to 10 percent of the entire Federal budget. S. REP. at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5268; *accord* H.R. REP. No. 660, 99th Cong., 2d Sess. 18 (1986) ("Evidence of fraud in Government programs and procurement is on a steady rise.").

[2] Information confirmed by Joseph C. Krovisky, Public Information Officer, Office of Public Affairs, U.S. Department of Justice on February 4, 1998. The Justice Department has not released equivalent statistics regarding total recoveries (non-*qui tam* as well as *qui tam*) under the amended Act. However, in a letter to Senator Charles Grassley dated July 23, 1996, DOJ indicated that, since the 1986 FCA amendments, total

cases have been filed during that same time period. In fiscal year 1997 alone, 530 *qui tam* cases were filed and more than $625 million was recovered.

Since enactment of the 1986 Amendments, the character of FCA litigation has evolved from primarily targeting false claims submitted by defense contractors to enforcing accountability in a broad variety of federal programs. Whereas 68% of *qui tam* recoveries during the first decade after the Amendments was attributable to Defense Department fraud, 54% of *qui tam* cases filed in FY 1997 involved the Department of Health and Human Services as the client agency. *Id.* This shift has been gradual, but steady. Since 1986, the Act has recovered hundreds of millions of dollars illegally diverted from health care programs like Medicare, Medicaid, and CHAMPUS, social services programs for children, government-sponsored scientific research grants, transportation safety initiatives, housing and urban development programs, and other important federal endeavors including defense.

The Act has also been effective in prosecuting a broad variety of means for committing fraud. It has successfully targeted double billing, product substitution, unnecessary services or services not performed, cost shifting, false testing, noncompliance with statutes, regulations, or contract terms, inadequate quality of care, kickbacks, and other methods of deceit.

The FCA is expected to continue to have salutary effects in the fight against fraud into the future. According to the analysis contained in a recent economic study, *qui tam* recoveries under the FCA can be expected to equal between

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civil fraud recoveries equaled $3.43 billion at that time. This letter has been lodged with the Clerk of the Court.

about $6.9 billion and $9.3 billion over the next ten years.[3] Further, deterrence of fraud due to the Act's *qui tam* provisions can be expected to range from between $105.1 billion and $210.1 billion over the period 1996 to 2006. *Id.*

II. The Issue of the Appropriate Role for Government Employees or Agents to Play in FCA Litigation Is Central to the Proper Application of the Act.

The very nature of FCA litigation combined with the fact that the Government must act through employees and agents lead to the conclusion that the question of what is the appropriate role for government employees and agents to play in FCA litigation is a central one. Also, the fact that FCA litigation has been filed necessarily means that there has been at least an *accusation* of wrongdoing in connection with a government program. Prominent among those individuals with information about the alleged illegality are the Government's employees and agents.

As in the *Rabushka* litigation, courts are usually faced with the option of relying on the testimony of government employees and agents for information about the allegations. The Eighth Circuit seized that option and concluded, based on the deposition testimony of the agency's former principal deputy executive and chief negotiator, that "the PBGC would not have terminated CF&I's plan in 1985." Rabushka's Petition for a Writ of *Certiorari* at A-11. It was on the basis of that former government employee's testimony that the Eighth Circuit affirmed the lower court's granting of summary judgment. In doing so, the appellate court ignored the more objective evidence contained in the law and the agency's

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[3] William L. Stringer, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT (Sept. 1996) (An Economic Study Commissioned by Taxpayers Against Fraud, The False Claims Act Legal Center). This material has been lodged with the Clerk of the Court.

regulations.

Government employees and agents cannot be expected to be objective witnesses when testifying in the context of litigation resulting from their decisions during their government employment. Their reputations and, if they are still employed by the Government, their job security may be in jeopardy if their behavior or failure to act is viewed as enabling or contributing to alleged illegality. At best, the government employee or agent may be viewed as incompetent; or worse, he or she may be seen as dishonest or involved in the alleged violation.

Given these realities, therefore, it would be imprudent to expect the input of a government employee or agent in FCA litigation to constitute objective information. Instead, it is more reasonable to expect that information from a government employee or agent in litigation under the Act would be, at best, subjective and, even possibly, self-serving. More objective information to help resolve FCA litigation would come from the laws and regulations applicable to the practices of the federal agency in question.

Because the issue of the proper role for government employees and agents to play is more likely than not to arise in FCA litigation, it is an issue central to the proper application of the Act. By granting *certiorari* to the Eighth Circuit's decision in this case, the Court could resolve this pivotal matter.

CONCLUSION

For these reasons, TAF urges the Court to grant Rabushka's Petition for a Writ of *Certiorari*.

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No. 97-998

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OCTOBER TERM, 1997

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Petitioners,

VS.

CRANE CO.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF THE CASE

In its Counterstatement of the Case, Crane acknowledges the "abrupt reversal of fortune" that CF&I suffered in 1982. But according to Crane, CF&I was, miraculously enough, back to sound financial health by the time of the 1985 spinoff. This spin on events is nothing more than an encore performance of the very fraud that Crane perpetrated in 1985 on stockholders, pensioners, employees and the PBGC–purporting to spin off a viable company that Crane knew had no chance of surviving as an independent company. A brief rejoinder is in order.

According to both Crane's CEO and its President, by February 1984 CF&I was a "bankrupt company." Crane's CEO saw "a number of problems" with spinning off CF&I in 1984, among which were "that there was no long-term financing in place" and that "giving the stockholders a taxable dividend in a bankrupt company wasn't doing them a favor." Crane's President testified that if CF&I was spun off without adequate, long-term financing, "CF&I would go into bankruptcy," precisely what Crane's President regarded as being contrary to everything "[m]oral, ethical, sound business practice, common sense, and the American way."[1] In IRS filings, Crane stated that CF&I needed "debt financing in order to survive." However, in 1985 Crane misleadingly told stockholders that the spinoff would "enhance CF&I's ability to obtain needed financing." CF&I never obtained that financing.

Crane claims CF&I had a "positive cash flow" of $29 million in 1984 and $12.5 million in 1985, as well as increased working capital. That cash flow and working capital were only possible because Crane had required CF&I to slash its pension fund

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[1] The foregoing, which Crane criticizes as "argument by sound bite" and "a shameless distortion of the record," Opposition at 4 n.2, is the sworn testimony of Crane's CEO, Robert Evans and President, Robert Slater, given before the SEC in 1985.

contributions in 1982. Thus, unlike CF&I's pension contributions of $38 million in 1980 and $22 million in 1981, CF&I made *no* pension contributions at all in 1983, 1984, 1985 and 1986. If Crane had permitted CF&I to continue making its pension contributions as it had consistently done for years prior to 1982, CF&I would not have had those positive cash flows or working capital and may well have been in bankruptcy before Crane spun it off in May 1985. In addition, the four straight years of zero pension contributions permitted the unfunded liabilities to skyrocket far in excess of the pension fund's rapidly diminishing assets.

Moreover, CF&I continued to report annual *losses*: $28.1 million in 1984, $3.4 million in 1985 and $20.9 million in 1986. CF&I's net sales dropped sharply–$22.5 million in the first half of 1985, $72 million by year end, and yet another $60 million in 1986. CF&I was also faced with the "pressing problem of trying to keep afloat during the next several months because cash is projected to be at zero sometime in October of 1986." According to CF&I's chairman, CF&I "basically lived to fund the pension plan" from the time of the 1985 spinoff to the 1990 bankruptcy.

The rosy scenario that Crane attempts to portray of CF&I is the same mirage that Crane created for public consumption at the time of the 1985 spinoff. It was never CF&I's reality.

ARGUMENT

Crane does not dispute that *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128 (1972), applies to this case. The Eighth Circuit, however, failed to apply *Affiliated Ute*, denying Petitioner the benefit of the presumption of reliance which this Court established in that case. Having committed that fundamental error, the Eighth Circuit never considered whether Crane's evidence of nonreliance was sufficient to overcome the presumption of reliance as a matter of law. These and other errors warrant a grant of *certiorari*.

I. The Eighth Circuit's holding that reliance is an element of a fraudulent omissions case irreconcilably conflicts with *Affiliated Ute*'s holding that reliance is *not* an element of such a case.

Crane does not even attempt to reconcile the Eighth Circuit's holding that reliance is an element of (indeed, is "the very heart of," App. at A-8) a fraudulent omissions case, with this Court's holding that reliance is *not* an element of such a case. *Affiliated Ute*, 406 U.S. at 153-54. Apparently due to this stark conflict, Crane has chosen not discuss the Eighth Circuit's *holding*. Rather, Crane devotes its entire brief to defending the Eighth Circuit's *result* exclusively on grounds never even reached by the Eighth Circuit.

The only possible difference between this case and *Affiliated Ute* is that this is a False Claims Act case and *Affiliated Ute* was a securities fraud case. The reason Crane does not draw this distinction is most probably because that distinction actually weighs *in favor* of a grant of *certiorari*. If private investors are entitled to a presumption of reliance in fraudulent omissions cases against those who defraud the marketplace, it follows *a fortiori* that the public should be entitled to that same presumption in fraudulent omissions cases against those who would defraud the public purse. The *Affiliated Ute* presumption of reliance is not grounded upon the securities statutes, regulations or even any policy concerns unique to the realm of securities. The presumption is based upon the recognition that in cases of nondisclosure "it is of course impossible to demonstrate reliance." *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 239 (2d Cir. 1975). The Second Circuit's observation is perhaps even more true in FCA cases, where the party whose "reliance" is at issue is the Federal Government and not a single individual.

The binding law throughout the Eighth Circuit now unjustly burdens the Government with the "impossible" task of proving

reliance on a nondisclosure. The plain and irreconcilable conflict between the Eighth Circuit's holding and *Affiliated Ute* alone warrants a grant of *certiorari*. The case is all the more worthy of *certiorari*, however, given what is at stake: the public's recovery of nearly $1 billion[2] for Crane's fraudulent concealment of highly material information from the Government, causing the Government to assume more than $222 million worth of Crane's pension liability. The Eighth Circuit's decision is abysmally bad law, standing in stark and intolerable conflict with *Affiliated Ute*. This Court's review is clearly warranted.

II. By imposing upon plaintiff, rather than defendant, the burden of proof on the issue of reliance, the Eighth Circuit placed itself in direct conflict with the very circuit decisions which Crane argues reconcile the Eighth Circuit's decision with *Affiliated Ute*.

Crane attempts to show only that the Eighth Circuit's *result* does not conflict with *Affiliated Ute*. In implicit concession that *Affiliated Ute* applies to False Claims Act cases based upon fraudulent omissions, Crane argues that the Eighth Circuit analyzed and decided this case in accordance with *Affiliated Ute* and its lower court progeny. In point of fact, the Eighth Circuit nowhere discusses *Affiliated Ute* or its progeny. Instead, in derogation of those decisions, the court never gave Petitioner the benefit of the *Affiliated Ute* presumption of reliance, and it never considered whether Crane's evidence was sufficient to overcome that presumption as a matter of law. According to the very cases upon which Crane relies, the failure to accord a plaintiff the benefit of the *Affiliated Ute* presumption constitutes reversible error. As Crane points out, "[e]very Circuit Court which has

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[2] In addition to awarding prejudgment interest, the False Claims Act mandates the trebling of the Government's compensatory damages, damages which exceed $222 million in this case. 29 U.S.C. § 3729(a).

considered the issue has ruled that the presumption of reliance set forth in *Affiliated Ute* may be rebutted." Opposition at 9. But, as Crane fails to point out, all eight of those circuits agree that "proof of the materiality of an omission . . . *shifts the burden of persuasion* on the issue of reliance. It is thus the defendant who must prove" nonreliance. *Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) (emphasis added) (quoting *Rochez Bros. v. Rhoades*, 491 F.2d 402, 410 (3d Cir. 1974)).

In *Du Pont*, upon which Crane relies, the Second Circuit held that under *Affiliated Ute*, requiring a plaintiff to prove reliance in a fraudulent omissions case is reversible error. 828 F.2d at 78-79. The Eighth Circuit committed that very error in the present case, imposing on Petitioner, instead of on Crane, the burden of persuasion on the issue of reliance. The Eighth Circuit wrote that reliance "goes to the very heart of Rabushka's claims," that "[i]f Rabushka cannot show" reliance his case fails, and that Rabushka "does not have sufficient evidence to avoid summary judgment." App. at A-8, A-11. This flawed analysis of the evidence stems directly and unmistakably from the Eighth Circuit's initial error of refusing to give Petitioner the benefit of the *Affiliated Ute* presumption of reliance.

Attempting to salvage the result, Crane seems to suggest that the Eighth Circuit found that Crane had so decisively established the PBGC's nonreliance that no finder of fact, even aided by the *Affiliated Ute* presumption, could rationally conclude otherwise. Crane argues that the Eighth Circuit's gratuitous remark that Crane's evidence "overwhelmingly establishes that the PBGC would not have terminated CF&I's plan in 1985," aligns the court's otherwise erroneous opinion with case law recognizing that the *Affiliated Ute* presumption is rebuttable.

The fatal flaw in Crane's argument is that the Eighth Circuit did not give Petitioner the benefit of the *Affiliated Ute* presumption, and thus could not and did not evaluate whether Crane's

evidence was sufficient to overcome that presumption. Moreover, according to the Eighth Circuit, it was not the weight of Crane's evidence which supported the summary judgment but rather Petitioner's *lack* of evidence of reliance: "although Rabushka may have a scintilla of evidence in support of his theory, he does not have sufficient evidence to avoid summary judgment." App. at A-11.

It was only *after* the Eighth Circuit had already determined that Petitioner could not make his case that the court gratuitously commented upon Crane's evidence. The Eighth Circuit obviously viewed Crane's evidence as a mere final nail in Rabushka's coffin, a coffin resulting from Rabushka's failure to carry the burden on the issue of reliance. The Eighth Circuit certainly never considered whether Crane's evidence was so one-sided so as to overcome the *Affiliated Ute* presumption as a matter of law. This critical error squarely places the Eighth Circuit's decision in direct conflict with each and every one of the other circuit courts which have addressed the relative burdens of proof under *Affiliated Ute*. That conflict warrants a grant of *certiorari*.

III. But for Crane's fraudulent concealment of CF&I's true financial condition, the PBGC should and would have done precisely what it did after it learned of CF&I's financial plight.

In addition to its other errors, the Eighth Circuit committed a basic error of well-established summary judgment law. Rather than viewing Petitioner's evidence in the light most favorable to him, the court dismissively labeled his evidence as a "scintilla." App. at A-11. That evidence, whatever its weight, should have been viewed as buttressing the *Affiliated Ute* presumption of reliance, something the Eighth Circuit could not possibly have done, given its failure to recognize that presumption.

The Eighth Circuit discounted entirely Royal Dellinger's (the former PBGC employee on whose testimony Crane rests its

entire argument) concession that if the PBGC had known that the spinoff would completely liquidate CF&I, the PBGC

> clearly would have reviewed the case differently.... I think the agency would have initiated an effort to find out if in fact a liquidation was going to occur. App. at A-11.

The Eighth Circuit also ignored the undisputed fact that when the PBGC finally did terminate CF&I's pension plan, it did so despite the very conditions which Dellinger said *must* exist for termination according to some unwritten PBGC "policy"–a "policy" which according to Dellinger remains in place to this day. That alleged, unwritten "policy" was that the PBGC would not terminate a plan "unless it became apparent that the Plan would be unable to make pension payments within the year." Opposition at 8. However, after CF&I's true financial plight could no longer be concealed from outsiders, the PBGC terminated CF&I's Plan even though, by the PBGC's own estimation, CF&I was at least *two years* away from being unable to pay benefits. The PBGC's termination of the Plan under these circumstances directly contradicts Dellinger's uncorroborated testimony about the supposed PBGC "policy" which is the sole basis for the Eighth Circuit's opinion.

Moreover, internal PBGC documents show that when the PBGC terminated the Plan, it relied primarily on CF&I's pre-1985, pre-spinoff financial crises, concluding that "CF&I Steel is a very sick company with a heavily underfunded pension plan." The PBGC cited CF&I's "*1982* restructuring"–three years before the spinoff–as having left "a retiree burden beyond CF&I's ability to handle." Thus, not only did the PBGC do what Dellinger says it would never have done (*i.e.*, terminate the Plan in the absence of the condition precedent he cited), the PBGC took that action for reasons Dellinger says would never have prompted PBGC action. By crediting Dellinger's testimony, the Eighth Circuit made precisely the kind of credibility assessment

which is entirely inappropriate when considering a motion for summary judgment.

IV. By refusing to consider the unlawfulness of the action Dellinger claims he would have taken, the Eighth Circuit implicitly and necessarily repudiated this Court's recognition of "[t]he general principle of public policy applicable to all governments that the public interest should not be prejudiced by the negligence or default of public officers."

In an effort to circumvent yet another conflict between the Eighth Circuit and this Court, Crane tries to recast the issue here as a "policy dispute" between Petitioner and the PBGC. In doing so, Crane elevates the alleged, unwritten Dellinger "policy" as the yardstick by which this government employee's conduct is to be measured. As the *amicus curiae* points out, "the laws and regulations applicable to the practices of the federal agency in question" must set the standard. *Amicus* Brief at 6. A Nuremberg-like defense ("I was only following agency policy") threatens to eviscerate the canon "that the public interest should not be prejudiced by the negligence or default of public officers." *United States v. St. Paul, M. & M. Ry. Co.*, 247 U.S. 310, 314 (1918).

This is not some arcane and antiquated policy. This Court recently reasserted its unflagging commitment to this principle:

> Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.

Office of Personnel Management v. Richmond, 496 U.S. 414, 420 (1990). As the Court in *Richmond* mentioned, this principle has been reiterated in "many other cases."

Dellinger speculatively claims that he would not have acted to prevent the PBGC's $222 million loss even if he had known that the PBGC "could have completely avoided such liabilities by asserting a claim against Crane." If that is true, then his conduct would have been reckless in the extreme and counter to the very mission of the PBGC. Although Dellinger has simply speculated about what he would *not* have done in 1985, this Court's precedents make abundantly clear that such unauthorized conduct would not have been binding on the Government anyway. By giving dispositive weight to Dellinger's claim, the Eighth Circuit has implicitly and necessarily repudiated those precedents. This conflict also warrants a grant of *certiorari*.

V. In Sections II and III of its brief, Crane resumes its attempted defense of the Eighth Circuit's result on grounds never discussed by that court.

As surmised in the treatise Crane cites, even a split among circuits regarding whether state or federal law applies to a case may not warrant a grant of *certiorari* when the application of either law yields the same outcome. Although that is a plausible rationalization for the unexplained denial of *certiorari* in *Sommerville v. United States,* 376 U.S. 909 (1964), it quite obviously has no relevance to the present case involving an outcome-determinative conflict with this Court's precedent.

Moreover, Crane's statement that "[t]he courts below granted Crane's motion for summary judgment on two independent grounds" is blatantly false. The Eighth Circuit affirmed "for a reason different from those relied upon by the district court"–a reason which is the very subject of the present Petition. In Section II, Crane discusses only the *district court's* reasoning for entering summary judgment. The validity of that reasoning now stands in considerable doubt, inasmuch as the Eighth Circuit declined to endorse it when given the opportunity to do so. In Section III, Crane advances a potpourri of theories which the

district court flatly rejected and still other theories which Crane raised for the first time on appeal; the Eighth Circuit never addressed any of these issues. Thus, if this Court grants *certiorari*, the "ultimate outcome" is not at all "evident." Crane offers no sound basis for a denial of *certiorari* in this case where the Eighth Circuit's decision stands in irreconcilable conflict with well-established law of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant a writ of *certiorari* in this case.

Respectfully submitted,

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